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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 664.

PIEDMONT & NORTHERN RAILWAY COMPANY, *Petitioner*,

v.

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD & OHIO RAILWAY, CAROLINA, CLINCHFIELD & OHIO RAILWAY OF SOUTH CAROLINA, AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY, *Respondents*.

BRIEF FOR THE RESPONDENTS, OTHER THAN THE INTERSTATE COMMERCE COMMISSION.

S. R. PRINCE,
F. B. GRIER,
CARL H. DAVIS,
WILLIAM C. BURGER,
JAMES J. MCLAUGHLIN,
SIDNEY S. ALDERMAN,
Solicitors for said Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF ON BEHALF OF RESPONDENTS OTHER THAN THE INTERSTATE COMMERCE COMMISSION, THE STEAM RAILROAD INTERVENERS.

STATEMENT OF THE CASE.

This was an equity suit brought by the Interstate Commerce Commission against petitioner under section 1, paragraph (20), of the Interstate Commerce Act as amended, 24 Stat. L. 379, 41 Stat. L. 478; 49 U. S. C. 1, par. (20),

and under Judicial Code, section 24, 28 U. S. C. 41, par. 8 (R. 2), to enjoin petitioner, admittedly an interstate carrier by railroad subject in general to the Interstate Commerce Act as amended (R. 2, 3, 59-60), from constructing threatened extensions of its lines of railroad, without having first obtained from the Commission a certificate of public convenience and necessity under the provisions of section 1, paragraphs (18) to (21) of said Interstate Commerce Act as amended (R. 71-72).

These respondents, competing steam railroads of the territory, intervened as plaintiffs (R. 73-88) and as "parties in interest" under section 1, par. (20). Their intervention was allowed. (R. 89.)

Petitioner, defendant below, admitted that it had applied to the Commission for certificate authorizing the extensions, but with reservation asserting that the Commission was without jurisdiction, and that the Commission, after full hearing, held that it had jurisdiction, found that the present or future public convenience and necessity had not been shown to require the construction of the extensions, and denied the certificate. (R. 60-61.) (See 138 I. C. C. 363.)

It admitted that at the time of the institution of this suit it was actually engaged in the extension construction, without certificate of public convenience and necessity, and with intention to engage in interstate transportation over the extended line of railroad. (R. 61-62.)

The answers (R. 59, 93, 98), as defense to the bill and the bill of intervention, asserted that defendant was free to build the threatened extensions without certificate of the Commission on two asserted grounds:

1. That the extensions had been "undertaken" by it, within the meaning of section 1, par. (18), of such Act, prior to the effective date of said paragraph; and,

2. That it was "an interurban electric railway which is not operated as a part or parts of a general steam rail-

road system of transportation," within the meaning of the exception of section 1, par. (22), of said Act, and that the threatened extensions would be extensions exempted by that paragraph.

On final hearing, the court below held (R. 435-457) that defendant had not undertaken its extensions prior to the effective date of paragraph (18). No error is assigned to this holding (R. 493-502) and the petitioner has abandoned its contention in this regard on this appeal, by assigning no error to this holding, on its petition for certiorari, and on brief.

The District Court further held that petitioner was not "an interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation," within the meaning of section 1, par. (22), and that its threatened extensions would not be extensions excepted by that paragraph, but would be extensions, the construction of which without certificate is forbidden by section 1, paragraphs (18) to (20), and is subject to be enjoined as matter of law under paragraph (20), at the suit of the Commission and of the intervening steam railroads as parties in interest. (R. 433-434, 447-457.)

The final decree permanently enjoined further prosecution of the extensions without certificate. (R. 487.)

In 1927, petitioner had determined to build these extensions, one an interstate extension of 53 miles from Spartanburg, S. C., to Gastonia, N. C., connecting its present line in South Carolina with its present line in North Carolina, and another of 75 miles, from Charlotte, N. C., the present northern terminus of its North Carolina line, to Winston-Salem, N. C. These extensions would effectuate a continuous interstate line of railroad of petitioner 255.89 miles long from Greenwood, S. C., and a connection there with the interstate Georgia and Florida, to Winston-Salem, N. C., and a connection there with the interstate Norfolk and Western system, and connections with several other steam railroad systems at various points. (R. 125,

424, 432.) See the statement of this Court in *Piedmont & Northern Ry. Co. v. United States,* 280 U. S. 469.

The Commission, learning informally of the project, advised petitioner by letter of March 8, 1927, that before constructing any extension or issuing any securities it would be expected to file applications for authority under sections 1 and 20a, but that such applications would be without prejudice to its right to assert that the Commission had no jurisdiction and to adduce evidence to support such contention, referring to the procedure outlined in *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. R. Co.,* 270 U. S. 266, 272. (R. 393-394, exhibit 109.)

Thereupon, on March 26, 1927, petitioner filed with the Commission its application for certificate of public convenience and necessity for the construction of the two extensions here involved, moving to dismiss its own application for alleged want of jurisdiction of the Commission on the same two grounds asserted in its answers in this suit. (R. 124, exhibit 2, R. 432.) These respondents intervened in opposition to the application. The Commission overruled the motion; took jurisdiction; held hearings and arguments; and, on April 3, 1928, denied the application on its merits. *Proposed Construction of Lines by Piedmont & Northern Ry. Co.,* 138 I. C. C. 363. (R. 6-58, 432.)

Petitioner then, on May 22, 1928, brought suit in the District Court below, under the Urgent Deficiencies Act, 28 U. S. C. 47, to annul, enjoin, and set aside the order of the Commission, asserting that the Commission was without jurisdiction on the same two grounds asserted before the Commission and asserted below in the answers in this suit. The Commission and these respondents intervened as defendants. The Commission moved to dismiss the bill for want of jurisdiction of the court on the ground that the order denying the certificate was a negative order, not subject to review by such suit. The court, three judges sitting, denied the motion, and, upon final hearing, dismissed the bill on its merits, holding against petitioner,

plaintiff there, on both grounds on which it asserted the Commission to have been without jurisdiction. *Piedmont & Northern Ry. Co. v. United States,* 30 F. (2d) 421.

On direct appeal by the plaintiff to this Court it was held that the trial court was without jurisdiction of the suit, the order of the Commission being negative, and this Court, without passing upon the merits, reversed because the District Court had dismissed the bill on the merits and with direction to dismiss the bill for want of jurisdiction of the court. *Piedmont & Northern Ry. Co. v. United States,* 280 U. S. 469.

After this Court rendered that opinion, the opinion was read to the Board of Directors of petitioner at a meeting on March 10, 1930, and the Board thereupon adopted resolutions reaffirming the intention and plan to build both extensions and authorizing its officers to proceed toward completion of the extensions by beginning and prosecuting actual construction on the interstate connecting link from Spartanburg, S. C., to Gastonia, N. C. (R. 122-124.) Petitioner's President, by letter of March 11, 1930, to the Chairman of the Commission, advised that construction work had begun, explained that this seemed the only way, under this Court's decision, to assert his company's conception of its legal rights, and enclosed certified copy of the Board's resolutions of March 10, 1930. (R. 385-386.) That precipitated the present suit, bill in which was filed April 16, 1930, in the same District Court. (R. 1.)

In its opinion in the former suit, this Court said, "It is true that if the railway builds without having secured certificate, it may suffer serious loss. For a court may hold, in an appropriate proceeding, that the railway is within the purview of paragraph 18." Admittedly, this suit is "the appropriate proceeding" referred to by this Court, and in it the court below has held that petitioner "is within the purview of paragraph 18" and has enjoined its threatened extensions pursuant to paragraph (20).

No other penalty of that paragraph has been invoked against petitioner.

Petitioner appealed from the decree below to the Circuit Court of Appeals for the Fourth Circuit, and this Court granted certiorari to review the cause prior to the determination thereof by the Circuit Court of Appeals.

In determining the correctness of the decision below, holding petitioner's railroad lines and its proposed extensions thereof to be within the purview of paragraph (18), and not within the immunity of paragraph (22), it is, of course, necessary to consider not only the character of petitioner's present lines and of the railroad business it has done and is doing over those lines, but also the character, scope, and purpose of its enjoined extensions, the business expected and intended to be done over the extended lines if the extensions should be built, the traffic territory not previously served by petitioner which would be invaded by the extensions, the resulting competition and injury to be suffered by the interstate steam railroads now serving that territory, and the effect on transportation of national importance and on the national system of transportation. *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266; *Texas & New Orleans R. Co. v. Northside Belt Ry. Co.*, 276 U. S. 475; *Western Pacific California R. Co. v. Southern P. Co.*, decided November 23, 1931, 76 L. Ed. (adv.) 120.

The District Court, in compliance with Equity Rule 70½, found the facts specially (R. 402-433) and stated separately its conclusions of law therein (R. 433-435). There is no substantial challenge to the facts as found by the District Court in the assignments of error; and the petition for certiorari, the supporting brief, and the supplemental brief of petitioner in no wise challenge the facts as found by the District Court. These facts will accordingly be accepted and this Court may take them as admitted without exploring the evidence. However, any in-

cursion into the voluminous evidence will abundantly support the facts as found below.

The facts particularly important to the question here raised, as to the character of petitioner's lines of railroad, the business done thereby, and as to the character of the enjoined extensions, the business to be done thereby, and the effect thereof, will be found in the District Court's findings on pages 404-405, 411-425, of the record.

On the brief of these respondents in opposition to petition for certiorari, pages 4-14, we gave a somewhat condensed statement of these findings of fact, to which reference is hereby made. These undisputed facts may be summarized, with further condensation, as follows:

Petitioner is incorporated as a standard railroad, not as a street, suburban, or interurban railroad, and has all the powers of a railroad and power to operate by any motive power it may choose.. (R. 403.)

It operates on private right of way and around cities, except for 2.25 per cent of its mileage which is in streets. (R. 404.)

It was built pursuant to an ambitious plan to furnish important interstate freight carriage for the industrial piedmont sections of North and South Carolina. (R. 404-405.) Its main original purpose was to tap important industrial traffic concentrations in both states, to provide a preferred connection to the Seaboard giving that system access to these concentrations which it had not previously had, and this purpose was effectuated by the contract with the Seaboard. (R. 405-407.) The result was substantial diversion of important interstate traffic from the respondents to new joint through routes over petitioner and Seaboard and its connections (R. 406-407, 419-420) and this effect has continued to the present (R. 418-419).

Petitioner is built as a standard railroad on steam railroad standards. (R. 411-412.) Its extensions are planned on even higher standard to carry more heavy freight traffic. (R. 412.)

Its freight carrying equipment is steam railroad equipment and moves in interchange all over the United States. Foreign line equipment from the entire country moves over petitioner's lines constantly. Eighty five per cent of its expenditure for equipment has been for freight carrying equipment. It has terminal facilities of steam railroad standard and joint terminals with steam roads. It draws freight trains of from 40 to 65 cars. (R. 412-413.)

Its local passenger business is handled like what is ordinarily known as interurban passenger business but it has invaded the national field even as to passenger business, selling through tickets and checking baggage to points all over the country and to Cuba. (R. 413-414.)

Its operating methods in handling freight are indistinguishable from methods of the interstate steam railroads, except as to differences in detail purely incident to electricity as motive power. It operates daily freight package car service from points in distant states in connection with steam roads and ocean steamship lines. (R. 414-415.)

Its methods of traffic solicitation, memberships in steam railroad traffic organizations, and its tariffs are similar in character to those of the interstate steam carriers and are national in scope. Its tariff changes affect rates of carriers all over the country. (R. 415-416.)

Its freight revenues have relatively increased until they are 94.5 per cent of its total revenues. (R. 416-417.) Of its freight revenues 95.7 per cent are from interline interchange and only 4.3 per cent from local freight. Passenger revenues are inconsequential and 97.8 per cent thereof are local. (R. 417-418.)

Since 1916 it has been a Class I interstate carrier with operating revenues over a million dollars annually. Since 1923, its operating revenues have exceeded two million annually. For 1929 its total revenues were $2,451,993.34, of which $2,317,528.77 were from freight, and 80.7 per cent of which freight revenues were from interstate freight. (R. 418.) It interchanges an average of 6,000

cars of freight a month moving to and from points all over the United States and Canada and Mexico. (R. 419.)

It is now an important link in joint through routes of the southeast and if the extensions were built it would become an important link in new joint through routes establishing a new effective trunk line of connecting carriers of national scope and importance. (R. 420-421.)

The effect of its extensions would be a gain to it of nearly four ~~five~~ million dollars of interstate freight revenues the first year, increasing yearly at a rate of about 8 per cent., and a corresponding diversion from these respondents of at least twice these revenues to their irreparable injury. (R. 421-422.)

Its extensions would make a new route from coal fields and would seriously injure a new line of the Louisville & Nashville built under authority of Commission certificate. (R. 422.)

It is owned and controlled by great electric power interests who are large freight shippers of the territory and control much freight traffic of others, which traffic is thus removed from competition and delivered by control to petitioner, to Durham & Southern, an interstate steam railroad owned by substantially the same interests, and to the preferred connection of both, the Seaboard. (R. 422-423.)

Petitioner is engaged in the same essential business as these respondents. That part of its business which is local and "interurban" in character is wholly inconsequential. Its enjoined extensions propose to add to its national, not to its local, business. It is an important part of the national steam railroad system of transportation sought to be fostered and preserved by the Transportation Act. (R. 423-424.)

Yet it asserts absolute freedom to extend *ad libitum* without federal authority or regulation, on the theory that it is a "street, suburban or interurban electric railway,

which is not operated as a part or parts of a general steam railroad system of transportation."

The record is entirely clear that petitioner, as the predominant part and practically the whole of its business, is engaged, and if extended as threatened would be much more heavily engaged, in an interstate freight business of national scope and importance, of exactly the same character as that done by these respondents, steam railroads of the territory. The only substantial distinction between petitioner and steam railroads, such as these respondents, is that it uses electricity for motive power and they use steam. All the differences in construction, equipment and operation are purely incidental to electric motivation, and petitioner has express charter power to use steam for motive power. (R. 403.) If it could extend without certificate, it could at once change to steam operation and accomplish by indirection what no steam interstate carrier could do under the law.

If petitioner is free to build the enjoined extensions without the Commission's certificate under paragraph (18) then any interstate railroad operated by electricity, if owned and operated independently of any steam railroad, could build without federal authority any extensions it might desire—could build a railroad system across the continent.

Petitioner stresses the alleged peculiar adaptability of electric motivation to interurban service: frequent stops, light and short trains, smallness and frequency of passenger units, etc., as distinguishing it from steam railroads subject to paragraph (18). But the whole of its local freight and passenger business constitutes so small a part of its entire business as to be inconsiderable. Its main business is interstate, interchange freight, national in scope, moving throughout the United States, and even to and from Canada and Mexico, and of a character exactly similar to the business of these respondents, all of which also do a local interurban business in the carriage

of passengers and freight similar to the small business of that character done by petitioner.

If such a railroad is immune from federal regulation and is free to build such extensions as those here enjoined, without Commission certificate under paragraph (18), and, indeed, in the face of denial of said certificate on Commission finding that public convenience and necessity do not require these extensions, then certainly Congress has, by inartificial choice of language, failed to accomplish the purposes which every one recognizes it sought to accomplish by the passage of the Transportation Act. It would take a most forced and strained construction of the exception or proviso contained in this highly remedial statute to arrive at such a conclusion.

THE QUESTION INVOLVED.

The petition for certiorari, and petitioner's briefs, bring the case down to a narrow compass, the question involved being accurately stated on page 6 of petitioner's supplemental brief.

That question necessarily falls apart in two branches:

1. Is petitioner "an interurban electric railway" within the meaning of paragraph (22) and would its enjoined extensions be the extensions of a railroad within that description?

2. Is petitioner "not operated as a part or parts of a general steam railroad system of transportation" within the meaning of that paragraph?

The ultimate holding of the court below, here to be reviewed, is that petitioner's present lines and proposed extensions come within the purview of paragraph (18) and are not within the immunity of paragraph (22), which provides:

> "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, in-

dustrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The court below supported its conclusion only on the reasoning that petitioner's threatened construction would not be extensions of an interurban electric railway, within the meaning of that paragraph. It rejected the additional reasoning asserted by these respondents (R. 81, allegation 16, Bill of Intervention) that in any event petitioner is "operated as a part or parts of a general steam railroad system of transportation," within the meaning of that language in paragraph (22) and is hence not within the exception for that additional reason. The court below thus followed the reasoning contained in the opinion of the court of three judges, Soper, J., writing, in the former suit, which opinion rejected our reasoning that petitioner is "operated as a part or parts of a general steam railroad system of transportation" but adopted our reasoning that it is not and would not be if extended an "interurban electric railway," within the meaning of paragraph (22). See 30 F. (2d) 421.

Either reasoning, or a combination of both, leads to the same conclusion, that petitioner and its extension proposals do not come within the immunity of paragraph (22). To hold that petitioner and its proposed extensions are not within the purview of paragraph (18) and that it is free to build the extensions without certificate, and hence to reverse the injunction decree below, this Court would have not only to reject the District Court's reasoning on the construction of the words "interurban electric railway," and their application to the facts of this case, but also to go further and approve the reasoning of the court below on the meaning of the words "which is not operated as a part or parts of a general steam railroad system of transportation," as used in the paragraph.

Even if there were error, which we deny, in the District Court's construction and application of the first clause containing the main exception, there would be no reversible error in the injunction decree if, upon the facts, the court below should have held that petitioner is "operated as a part or parts of a general steam railroad system of transportation," within the meaning of the limitation upon the main exception, which is an exception to an exception.

The only question for this Court is whether the court below correctly held petitioner and its extension projects to fall within the certificate requirement of paragraph (18) and not to fall within the immunity of paragraph (22). To establish that it is not subject to the prohibition but is within the immunity, the petitioner would have to establish both: that it is an interurban electric railway; and that it is not operated as a part or parts of a general steam railroad system of transportation. It must have both these characteristics before the immunity of paragraph (22) can apply. The entire question is before this Court on the record.

We assert that the injunction decree below is correct on both grounds, that upon the undisputed facts petitioner is not an "interurban electric railway" and its extensions would not be the extensions of such railway, within the meaning of the paragraph, and, in any event, it is "operated as a part or parts of a general steam railroad system of transportation," within the meaning of the expression in the paragraph.

This appeal calls for construction of both expressions as applied to the facts of this case. The two expressions must be construed together in the light of the remedial purposes of the legislation and the meaning of the latter expression bears upon the meaning of the former. A proper construction of either expression, and, *a fortiori*, a proper construction of both read together, will inevitably lead to the conclusion that Congress did not grant immunity to such extensions of such a railroad as here involved.

SUMMARY OF ARGUMENT.

I.

Petitioner and its enjoined extensions do not come within the meaning of the expression of paragraph (22) excluding from the authority of the Commission "construction * * * of street, suburban, or interurban electric railways," and hence the extensions without certificate were properly enjoined.

1. The words "interurban electric railways" in paragraph (22) have no clearly defined or technical meaning, are essentially ambiguous and necessarily call for construction.

2. The decision below correctly followed, and was controlled by, the decisions of this Court construing the Transportation Act in the light of its context and in the light of the remedial purposes it sought to accomplish, particularly *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, and laying down the controlling rules of statutory construction.

3. The decision below does not conflict with this Court's decisions in *Omaha & C. B. Street Ry. Co. v. I. C. C.*, 230 U. S. 324, and in *United States v. Village of Hubbard*, 266 U. S. 474.

4. The argument based on comparison of the slightly varying exclusion provisions of section 1, par. (22), and of sections 15a, 20a, 73, and 77, does not lead to the conclusion asserted by petitioner.

5. All the light to be found in the legislative history of the Transportation Act supports the decision below and shows that Congress did not intend to exclude such extensions of such a railroad as here enjoined.

6. General usage of the term "interurban electric railways" at and prior to the passage of the Transportation Act did not include or contemplate such a railroad as petitioner; and, if it had, it would not control the meaning of the statutory language.

7. The decision below is in accord with later and more authoritative decisions of the Commission and with the holdings of the lower federal courts.

8. Informal treatment of petitioner, in other connections, as an interurban electric railway, by the Commission prior to its formal decision in 138 I. C. C. 363, the ruling of the old Railway Labor Board, holding that petitioner was excluded from its jurisdiction under section 300 of the Transportation Act, and the fact that the Census Bureau and the Post Office Department have classed petitioner with other electric railways, some of which may be "interurbans," are without present significance.

II.

Petitioner is "operated as a part or parts of a general steam railroad system of transportation," within the meaning of the limitation upon the exclusion in paragraph (22), and hence is within paragraph (18). Thus, in any event, the extensions were properly enjoined.

ARGUMENT.

I.

Petitioner and Its Enjoined Extensions Do Not Come Within the Meaning of the Expression of Paragraph (22) Excluding from the Authority of the Commission "Construction * * * of Street, Suburban, or Interurban Electric Railways," and Hence the Extensions Without Certificate Were Properly Enjoined.

1. The words "interurban electric railways" in paragraph (22) have no clearly defined or technical meaning, are essentially ambiguous and necessarily call for construction.

Petitioner, on its Supplemental Brief, adds only one argument to the four points argued on its Brief in support of Petition for Certiorari, the argument that the ex-

pression "interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation" is so plain and unambiguous as to leave no room for construction.

That expression is much more vague, doubtful and ambiguous than the preceding part of the same sentence, "of spur, industrial, team, switching or side tracks, located or to be located wholly within one State," yet this Court, in *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, construed those words in the light of the context and of the remedial purposes of the Transportation Act, rejected the literal or narrow meaning of "spur" and "industrial" tracks, rejected use of those words by Commission and courts, and reversed the Circuit Court of Appeals, which had applied what it conceived to be the literal meaning of the words and had refused to construe them in the light of the legislative purposes, upon the same theory invoked by petitioner on brief. See 4 F. (2d) 904.

If the words here involved be as plain and unambiguous as petitioner contends, it is strange that it did not proceed on its judgment in 1927 to extend without applying for certificate. The ambiguity inherent in the words themselves was originally sufficient to impel petitioner to litigate under protest before the Commission and to litigate voluntarily in the courts. The ambiguity in the words themselves was sufficient to raise in petitioner what this Court, on the former appeal, called its "fear instinct in the prophecy as to whether it will be held to be an interurban electric within the meaning of paragraph 22."

Plain and unambiguous words in a statute, within the meaning of the doctrine invoked by petitioner, do not raise a fear instinct in a prophecy as to their meaning and application. He who runs may read and apply plain and unambiguous language. Either petitioner knew it was not within the meaning of the words, if plain and unambiguous, or the words were so ambiguous that it dared not rely on its interpretation as applied to its facts.

After five years of litigation, during which the Commission, a special court, and the court below have uniformly construed the statutory words contrary to the vigorous contention of petitioner, it cannot now be asserted that the words are so plain and unambiguous as not to call for interpretation. Petitioner went to every length to have them authoritatively interpreted before it determined to test the question by forcing the issue by actual construction.

The quotation, p. 7 petitioner's Supplemental Brief, from *Crooks v. Harrelson,* 282 U. S. 55, while apt to that case, is entirely inapt here. The Court was there construing a tax statute, as to which the rule is to construe strictly against the government and in favor of the taxpayer, and to narrowly confine words to their literal meaning. Here the diametrically opposed rule applies, to construe a remedial statute liberally to effectuate the remedy, and to construe exceptions or provisos therein strictly.

The statutory language in issue in *United States v. Missouri P. R. Co.,* 278 U. S. 269, from the opinion in which petitioner quotes, Supplemental Brief pp. 9-10, was entirely different in character from that of section 1, paragraph (22), here involved. That case dealt with the plain provision of section 15, paragraph 4, that the Commission shall not require a carrier, without its consent, to participate in a through route which does not include substantially its entire line lying between the termini of the route. The Commission by order had required the Missouri Pacific to participate in a through route including only 46 miles of its line, whereas 308 miles of its line lay between the termini of the route. The language of that provision of the statute was, as this Court held, so plain and unambiguous as to leave no room for construction and the Commission's order clearly violated the provision. The principal contention of appellants there was not that the language was ambiguous and called for construction, but

that the re-enactment of the provision in the Transportation Act adopted previous uniform administrative construction expanding or modifying the plain words of the statute.

The quotation from the opinion there has no application here, where we have involved loose, vague, ambiguous, and non-definitive language necessarily calling for construction. The same is true of the quotations from *Sturges v. Crowninshield,* 4 Wheat. 122,. 202, and *Pirie v. Chicago Title & Trust Co.,* 182 U. S. 438.

The meaning of section 1, paragraph (22), contended for by petitioner does lead to absurd and unreasonable consequences: that the mere incident of motive power confers freedom on an interstate carrier to extend *ad libitum* without certificate; that Congress deliberately discriminated against carriers operated by steam and in favor of carriers of the same class, engaged in the same national business, but operated by electricity; that Congress used the word "interurban" in the etymological sense as including every electric carrier operating between cities, when all carriers operate between cities, and not in its ordinary meaning as referring to a carrier of local or parochial importance; that Congress intended, while placing extensions and abandonments of steam carriers under strict control of the Commission, to leave entirely free from such control any electric carrier, no matter how national its importance and business, provided only it be not owned and controlled by a steam railroad.

Under all the cases, language which, if literally or etymologically construed, would lead to such absurd, impossible, and unreasonable consequences, to consequences so violative of the major purposes of the legislation, is language calling for construction, interpretation in the light of the legislative purposes. Unquestionably this appeal presents a case for construction of ambiguous language in an exception in a highly remedial statute. What, then, are the controlling principles for its construction?

2. The decision below correctly followed, and was controlled by, the decisions of this Court construing the Transportation Act in the light of its context and in the light of the remedial purposes it sought to accomplish, particularly Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U. S. 266, and laying down the controlling rules of statutory construction.

Although this Court has not expressly construed the particular words "street, suburban, or interurban electric railways" in paragraph (22) as applied to facts like those on this record and to the question here raised, it has fully defined the controlling principles for the construction of the Transportation Act, that it must be construed in the light of the context of its language, and in the light of the new legislative policy written into the Act, the evils sought to be cured, and the remedial purposes sought to be accomplished.

Wisconsin Railroad Commission v. Chi., B. & Q. R. Co., 257 U. S. 563;
New England Divisions Case, 261 U. S. 184;
Dayton-Goose Creek Ry. v. United States, 263 U. S. 456;
Railroad Commission v. Southern P. Co., 264 U. S. 331;
Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U. S. 266;
Alabama & V. R. Co. v. Jackson & E. R. Co., 271 U. S. 244;
Texas & N. O. R. Co. v. Northside Belt R. Co., 276 U. S. 475;
Western P. Cal. R. Co. v. Southern P. Co., October Term, 1931, decided November 23, 1931, 76 L. Ed. (adv.) 120.

And this Court has laid down another important and applicable rule for statutory construction, that whereas the remedial part of a remedial statute must be liberally construed, in order to effectuate its remedial purposes,

by the same token exceptions in a remedial statute must be strictly construed, because such construction is equally necessary to effectuate the remedial purposes.

Spokane-Inland Empire R. Co. v. United States, 241 U. S. 344.

And it has expressly construed the first part of the same sentence of paragraph (22) in accordance with those rules of construction.

Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., supra.

The Transportation Act of 1920 was a new departure in railroad regulation. It resulted from exhaustive investigations and studies by the interstate and foreign commerce committees of both houses, before which all possible light was thrown upon railroad problems. Previously Congress had regulated railroads only to the extent of preventing abuses. But the country at the end of federal control faced a situation in which the private owners could not take back their railroad properties for profitable operation unless the government should provide an affirmative regulation, not only to restrict and curb railroads, but also to foster, preserve and protect them. Otherwise, the country was threatened with the impairment of its great transportation systems.

The long labors of Congress resulted in the Transportation Act which did seek thus affirmatively to foster, preserve and build up the existing railroads through the powers given to the Interstate Commerce Commission. The regulation was unitary, having one general, all-controlling aim and purpose, and the particular means used and powers conferred are interrelated and essential parts of the whole. Among other particular powers and duties conferred were these: to prevent discriminations between persons and localities; to maintain group rate structures

and divisions which would assure fair return on investment to carriers; to recapture excess earnings above fair return to be used in a revolving fund to aid "weak sisters"; to supervise and control investments in new railroad construction, forbidding extensions or new construction or abandonments without certificate of public convenience and necessity, and to the same end to supervise issuance of securities for new investments.

In a series of cases these particular powers and duties have come before this Court for construction and interpretation and in each instance it has construed the statute in the light of the remedial purposes of the legislation.

The opinion of Chief Justice Taft for the Court in *Wisconsin Railroad Commission v. Chi., B. & Q. R. Co.*, 257 U. S. 563, first analyzed and described this new remedial policy written into the Transportation Act, and the background of evils sought to be remedied, in words since oft quoted. The Court there, giving a liberal construction to the Act to effectuate the legislative purposes, sustained a state-wide order of the federal Commission requiring the raising of intrastate rates above the level fixed by the state commission, to prevent discrimination against interstate and foreign commerce.

In the *New England Divisions Case*, 261 U. S. 184, the particular power involved was that authorizing the Commission, in fixing divisions in rates between connecting carriers, to take into consideration the importance to the public of the transportation service of the carriers. The Court held that this provision of the Transportation Act authorized the Commission to make a particular division of rates for the express purpose of relieving the financial needs of particular lines, so as to keep them in effective operation. The express provision of the statute there construed was in fact enlarged in the light of the remedial purposes of the whole legislation.

In *Dayton-Goose Creek Railway v. U. S.*, 263 U. S.

456, *the particular* power and duty of the Commission under the Transportation Act involved was the recapture provision. This Court affirmed the lower court in dismissing a bill to restrain the enforcement of an order of the Commission requiring the surrender of excess profits under the recapture clause. The Court reviewed its previous decisions construing the Transportation Act, held the recapture provision to be constitutional, and interpreted it, as to its scope of application, in the light of the controlling legislative purposes of the Transportation Act. The Chief Justice wrote this opinion and said:

> "This court has recently had occasion to construe the Transportation Act. In Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. Ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232, it was held that the act, in seeking to render the interstate commerce railway system adequate to the country's needs, had, by Secs. 418 and 422, conferred on the Commission valid power and duty to raise the level of intrastate rates when it found that they were so low as to discriminate against interstate commerce and unduly to burden it. In the New England Divisions Case (Akron, C. & Y. R. Co. v. United States) 261 U. S. 184, 67 L. ed. 605, 43 Sup. Ct. Rep. 270, it was held that, under Sec. 418, the Commission, in making division of joint rates between groups of carriers, might, in the public interest, consult the financial needs of a weaker group in order to maintain it in effective operation as part of an adequate transportation system, and give it a greater share of such rates if the share of the other group was adequate to avoid a confiscatory result.
>
> "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners

of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

"It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that, when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety."

The case of *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331, involved the power and duty of the federal Commission to control new investments, constructions and extensions as applied to the building of a new union station. The state commission had required the establishment of a new station. The railroad opposed the requirement on the ground that the federal commission had not issued a certificate of public convenience and necessity, authorizing the investment and construction. The state court annulled the order of the state commission, and on writ of certiorari this Court affirmed the state court. The Transportation Act contains no express provision requiring certificate of public convenience and necessity for the construction of a union station. But con-

struing the whole act together, in the light of its purpose, the Court held that paragraphs (18) to (21) applied and that federal certificate was required. The Chief Justice wrote the opinion in this case. He quoted the above quoted passage from the opinion in the *Dayton-Goose Creek case.* Giving a broad interpretation to the remedial provisions of paragraphs (18) to (21), the Court said:

> "It is argued that paragraphs 18 to 21 of Sec. 402, refer only to extensions of a line of railroad having the purpose to include new territory to be served by the interstate carrier, and do not refer to an extension of new main track for the mere purpose of rearranging terminals within the same city. We do not think the language of paragraphs 18 to 21 can be properly so limited. We are confirmed in this by paragraph No. 22 which immediately follows:
>
> > 'The authority of the Commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.'
>
> "This is a palpable distinction between the main tracks of an interstate carrier and its spur, industrial, switching or side tracks, and shows the legislative intention to retain any substantial change in the main tracks within the control of the Interstate Commerce Commission. It may well be that a mere relocation of a main track of an interstate carrier which does not involve a real addition to, or abandonment of, main tracks and terminals, or a substantial change in destination, does not come within paragraphs 18 to 21."

Construing together, in the light of the legislative purposes, both the provision for certificate as to extensions

and that for certificate as to security issues, the Court said:

> "But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 of Sec. 402, and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission.
>
> "Such a heavy burden as that involved in this new union station and the main track changes and extensions and other accessories would, in all probability, require the three railways to issue new capital securities, and this could not be done without the approval of the Interstate Commerce Commission. To be sure, this provision only becomes operative when securities have to be issued, and would not, of itself, prevent action by a state commission until such securities are seen to be necessary; but the provision indicates the general congressional plan."

The case most directly controlling of the question here is *Texas & P. R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, in which this Court again construed in the light of the same general purposes of the statute the very provisions here involved, the prohibition of paragraphs (18) to (20) and the exception to that prohibition in paragraph (22).

There the Santa Fe proposed to build a track only seven and a half miles long, wholly within one state, to reach and serve a certain group of industries not theretofore served by it but already served by the Texas & Pacific. The anticipated revenues to be gained by the Santa Fe and diverted from the Texas & Pacific if the track were built amounted to only about $500,000.00 a year and the track would cost about $500,000.00. Such a track came

literally within definitions of "spur" or "industrial" tracks as defined by commissions and by courts, in other connections. It came within such terms as loosely used by railroads and by general usage. The Santa Fe claimed immunity on the theory that the track would be a "spur, industrial, team, switching or side track(s), located or to be located wholly within one state," within the meaning of the first part of the sentence of paragraph (22).

Manifestly it would have been located wholly within one state, just as here the petitioner manifestly is an electric railway. The question there was whether the Santa Fe's track would be a "spur" or "industrial" track within the meaning of paragraph (22), just as here the question is whether petitioner is and its proposed trackage would be of "street, suburban or interurban," within the meaning of the same immunity paragraph.

Comparing the facts here, Piedmont & Northern's proposed extensions would total 128 miles, one of them crossing a state line, and would create a continuous interstate line of railroad 255.89 miles long. (R. 424.) They would cost, without additional rolling stock, $11,638,456.00. (R. 44.) They would invade new interstate freight territory not previously served by petitioner and served by these respondents, adequately as the Commission has found, and would gain for petitioner new traffic amounting to approximately four millions of dollars the first year, and increasing at the rate of 8.4 per centum annually thereafter, diverting longer haul revenues from these respondents of at least twice the revenues gained. (R. 421-422.) These extensions would be engaged predominantly in interstate freight traffic of national importance, materially changing the railroad system of the southeast and creating a new effective trunk line of joint connecting carriers through the territory.

It is inconceivable, in view of the remedial purposes of the Transportation Act, that Congress could have in-

tended to bring within the requirement of paragraph (18) the seven and one half mile intrastate track of the Santa Fe and at the same time to free from that requirement by the language of paragraph (22) trackage of the magnitude and importance here involved.

In the *Texas & Pacific Case,* this Court rejected the argument that the Santa Fe's proposed track was immune from certificate requirement under paragraph (22) based on use of the terms "spur" and "industrial" tracks by the Commission, by state legislatures, and by courts, in other connections. It said:

> "In support of its contention that the proposed line constitutes an industrial track, the Santa Fe cites instructions differentiating branches from spurs, which are given by the Interstate Commerce Commission in forms long prescribed for accounting purposes. It points also to uses made of these terms in other connections by courts, by the Commission, and by state legislatures. A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act of 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *The New England Divisions Case,* 261 U. S. 184; *The Chicago Junction Case,* 264 U. S. 258; *Railroad Commission v.*

Southern Pacific Company, 204 U. S. 331. The Act sought, among other things, to avert such losses.

"When the clauses of paragraphs 18 to 22 are read in the light of this congressional policy the meaning and the scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks * * * to be located wholly within one State.' Tracks of that character are commonly constructed to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest."

The court below followed these decisions of this Court, and felt itself particularly controlled by the *Texas & Pacific Case*. It said of that case, after reference to and quotation from the earlier decisions of this Court (R. 448-453):

"The Court in that case laid down the true guide for the construction of paragraph (22). It held that the guide was to be found in the context in which the language was used and in the relation of the specific provisions to the railroad policy and legislative purpose introduced by the Transportation Act. If the Court in that case had 'stuck in the bark' of the par-

ticular word used, had given to that word in this exclusion provision a purely literal meaning, the track sought to be built by the Gulf, Colorado & Santa Fe would have been an 'industrial track' just as much as the defendant in this case would be an 'interurban electric railway' within a strictly literal interpretation of that expression.

"The Supreme Court, in the Texas & Pacific case, did not allow their interpretation of the meaning of 'industrial track' to be controlled by arguments based on the rulings of the Commission as to what were industrial tracks, or by the sense in which railroad companies had loosely employed this expression. If they had been guided by such considerations, they would assuredly have held that the proposed track of only seven and one half miles was an industrial track. But the Supreme Court expressly repudiated these considerations, and took as its guide the real purpose which the extension would serve. They held that it was not an industrial track, but a real extension for which a certificate had first to be procured from the Interstate Commerce Commission before construction would be allowed, because of the effect which this extension would have on the rival railroad companies."

After quoting from the opinion in the *Texas & Pacific Case*, the District Court further said (R. 453):

"Such is the construction placed upon one half of paragraph 22. It is only logical to apply the same construction to the remaining portions of the same paragraph, *noscitur a sociis*. Congress bracketed these phrases together and it would be highly illogical to apply one rule of construction to one phrase and a different rule to the other."

We submit that the District Court's interpretation of this Court's decisions in the *Texas & Pacific Case* and in the previous cases construing the Transportation Act was entirely sound.

In *Alabama & V. R. Co. v. Jackson & Eastern R. Co.*,

271 U. S. 244, the Court followed and applied the decision in the *Texas & Pacific Case*. It broadly construed paragraphs (18) to (21) in the light of the remedial purposes, and held that by these and other provisions of the Transportation Act Congress had exclusively occupied the whole field not only of extensions and abandonments, but also of railroad connections, although the latter are not expressly mentioned in paragraphs (18) to (21), subject only to the narrow limitations of the exceptions contained in paragraph (22). After citing the *Texas & Pacific Case*, the Court there said:

> "The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so, shows that the jurisdiction of the Commission over such connections must be exclusive, if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively performed."

In the exceptions in paragraph (22) Congress only undertook to except those extensions and abandonments of such local and non-national importance as would not "imperil interstate commerce." Certainly the Commission cannot effectively perform the duties conferred by, and the legislative purposes enacted in, paragraphs (18) to (21) if paragraph (22) be construed to have left any electric railroad not owned or controlled by a steam railroad free to accomplish all the evils sought to be remedied.

In *Texas & N. O. R. Co. v. Northside Belt. R. Co.*, 276 U. S. 475, this Court cited the *Texas & Pacific Case* with approval and said:

> "The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest."

There the Court did not particularly construe the exemption language of paragraph (22). The specific holding was that so long as a steam carrier operates solely in intrastate commerce it does not come within the prohibition of paragraph (18), but that the moment it threatens an extension to be used in interstate commerce it comes within the prohibition. The holding of that case as to the purposes of these provisions of the Transportation Act is in entire harmony with previous decisions above cited.

In *Western Pacific California R. Co. v. Southern P. Co.*, decided November 23, 1931, 76 L. ed. (adv.) 120, this Court construed the expression "any party in interest" in the injunction provision of paragraph (20). Under that decision these respondents are unquestionably parties in interest entitled to maintain the present suit for injunction in the court below. The Court there again quoted from and re-affirmed the opinion in the *Texas & Pacific Case* as to the purposes of these provisions of paragraphs (18) to (22) of Section 1, and of that decision said:

> "Paragraphs 18 to 22, *supra*, were considered here in Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U. S. 266, * * * and were declared to be part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities."

The decisions of this Court above referred to are conclusive that these paragraphs of the Act are to be construed, first, in the light of the context of the language, and, second, in the light of the remedial purposes of the Act as those purposes have been declared by this Court.

A third rule for construction here particularly pertinent is that declared in *Spokane-Inland Empire R. Co. v. United States*, 241 U. S. 344, that whereas remedial provisions of a remedial act are to be liberally construed so as to effectuate the remedy, exceptions in such an act are to be

construed strictly, because a liberal construction of exceptions would have the same effect to defeat the remedial purposes as would a strict or narrow construction of the remedial provisions.

That case is particularly apposite here, not only for the general rule of construction stated, but also for the particular question there involved and its decision. The analogy to the situation here is close.

That was a suit by the United States to recover penalties against the railway company for violations of the Safety Appliance Act in hauling in interstate commerce cars not provided with hand holds or grab irons and not equipped with automatic couplers, as required by the act. The railroad asserted immunity under the exception in the act providing that it did not apply to "trains, cars, and locomotives * * * which are used upon street railways." The cars in question were being moved, at the time in question, over the railroad's interurban line. This line was distinct and separate from its street railway lines. The cars in question were, however, from time to time used on its street railway lines and the railroad argued, therefore, that they were within the statutory exception.

The argument of the railroad there was ingenious and was strikingly similar to the reasoning relied on by petitioner here. It argued that the statutory exception was unambiguous, and that the cars were literally used upon a street railway, which they literally were. It further made an elaborate comparison of the word "used" in the exception with the same word in the remedial part of the act, "used on any railroad engaged in interstate commerce." The contention was that since the Court had held the act to apply to all cars used on interstate commerce railroads, even though at the particular time moving in intrastate commerce, the word "used" in the exception clause must receive the same construction and exempt cars used on street railways, however temporary such use. It was further argued that to construe the ex-

ception not to apply to the facts at bar would be to expand without warrant the exact exclusion language used, and to treat "used" as if Congress had written "exclusively used," and the word "used" in the exception was contrasted with the words "exclusively used" in another exclusion provision exempting cars "exclusively used for transportation of logs." And the railroad there relied, as does petitioner here, on the decision in the *Omaha Street Railway Case,* 230 U. S. 324, as being controlling in its favor.

That argument was a clear parallel to petitioner's refinement of argument here in comparing exclusion provisions of different sections of the Transportation Act for distinctions of verbal nicety. But this Court rejected all those arguments, saying:

> "But we think the want of merit in the contentions is clear, and the unsoundness of the argument advanced to sustain them apparent. We say this because, while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment. That the meaning contended for would be in direct conflict with this rule would seem free from doubt, since the inevitable result of sustaining the contention would be to put it in the power of a railroad, by operating a train for a trifling distance over tracks within the exception, to thereby secure the right thereafter to operate such train over long distances without regard to compliance with the safeguards of the statute which otherwise would be con-

> trolling. And this reasoning disposes of the contention deduced from the use of the word "exclusively" in the provision excepting cars used on logging railroads, and its absence in the street railway clause, since, on the face of the statute, the object of both provisions was to exempt both the logging and street railway cars from the operation of the act only when used for logging, on the one hand, and on street railways, on the other, and not to exempt them when not so used."

In last analysis, all of petitioner's argument in this case comes down to the proposition that although petitioner's railroad and its enjoined extensions, and the business done and to be done by it, are clearly within the remedial purposes of paragraphs (18) to (21), yet because in paragraph (22) Congress used the words "street, suburban or interurban electric railways" in an exception, and because petitioner operates between cities and thus is "interurban" in a literal and etymological sense, and because it operates by electricity, and because in different sections Congress used those same words with slightly varying verbal modification, the Court should give a sufficiently broad and liberal construction to the exemption to exclude petitioner from the remedial provisions.

The opinion of Soper, J., (now circuit judge of the Fourth Circuit) writing for the three judges in the former suit, applied the doctrine of the *Spokane-Inland Case* to the facts here in a way which is highly persuasive, in spite of the lack of jurisdiction of that court to determine the merits because the plaintiff there had chosen an inappropriate procedure. It was there said, after quotation from the rule of construction laid down in the opinion in the *Texas & Pacific Case*, 30 F. (2d) 431:

> "Now it is obvious that the purpose of the law will be defeated by too liberal an interpretation of the term 'interurban electric railway.' It could not be given the broadest of all meanings, for it would then

comprehend any railroad using electric power which runs between cities, without regard to the character or extent of its business. The electrification of steam roads in 1920 had already progressed to a considerable extent, and it cannot be supposed that it was the intent of Congress to except all railroads which should adopt electric motive power from the control of the Commission over new construction and extensions. On the contrary, it is an elementary rule that exceptions from the general policy embodied in a statute are to be strictly construed and are not to be so interpreted as to destroy its remedial purpose. Spokane & Inland R. Co. v. U. S., 241 U. S. 344. * * *"

That court then, after discussing *Omaha & C. B. St. Ry. Co. v. I. C. C.*, 230 U. S. 324, and *United States v. Village of Hubbard*, 266 U. S. 474, and after very cogently disposing of the Piedmont & Northern's argument based on precise comparison of the various exceptions contained in paragraph (22), section 15a, section 20a, section 73, and section 77, of the Interstate Commerce Act as amended, continued:

"It is obviously difficult to form an exact definition of the term under discussion and to say when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute. But there is no difficulty in the case at bar in determining that the Piedmont & Northern has ceased to be primarily an interurban railroad. If any line of demarcation is to be drawn, there can be no doubt that a railroad, 92 per cent of whose traffic comes from the general transportation of freight, and 95 per cent of whose freight traffic is interchanged with carriers connecting it with all parts of the United States, is to be placed in the same category as a general steam railroad.

"It is going too far to say that the Piedmont & Northern is outside the jurisdiction of the Commission over extensions, because, literally speaking, it

is an interurban electric railway. It is well settled that the literal meaning of the terms of a statute do not necessarily control. The Supreme Court has applied the rule in the interpretation of the term 'carriers' in Omaha Street Railway Co. v. I. C. C., *supra*, and again in construing the term 'industrial track and extensions' in Texas & Pacific Ry. v. Gulf, etc., Ry. Co., *supra;* and in each instance, has held that the literal significance of the words must give way to the general purpose of the enactment. The decision in Spokane & Inland R. Co. v. U. S., *supra*, is particularly pertinent in view of the fact that by far the most important activity of the Piedmont & Northern is its general freight business which it carries on precisely like an interstate steam railroad, and that this business has little relation to the local interurban service which it renders. The United States brought suit in that case against the carrier for violation of the Safety Appliance Act, in failing to equip cars with certain appliances required by the statute. The dereliction was admitted; but it was contended that no offense had been committed because the act did not apply to a street railway and the cars of the carrier on their regular route traversed a line of street railway. The court held that the exception in the act did not apply because the cars were also used in regular interstate traffic; for otherwise, the plain purpose of the law would be defeated. A similar result would follow in the case at bar if the transportation of relatively insignificant interurban business by the Piedmont & Northern should deprive the Commission of power to control the railway in the greater field of its operations in which it competes with general railroad systems. See also Railroad Comm. of Cal. v. Southern Pac. Co., 264 U. S. 331, 44 S. Ct. 376, 68 L. Ed. 713."

And that court concluded, after elaborate review of the cases, and full consideration of all the arguments of the Piedmont & Northern, 30 F. (2d) 436:

"It is our conclusion that the more recent rulings of the Commission conform to the purpose of the

statute and point the way to the correct classification of the Piedmont & Northern. Its freight traffic dominates so completely the field of its operations, and reaches so far, through interchange with other railroads, that it is outside the class which Congress intended to exclude from the control of the Commission. Even if in the beginning it was merely an interurban railroad, its essential character has so greatly changed, and its operations and interests have become so similar to those of a general steam carrier, that it is now well able to commit the mischiefs of uncontrolled expansion, which the act was designed to prevent."

The District Court below followed the reasoning of the three-judge court (R. 442), independently reviewed and applied to the facts here the decisions of this Court, and unerringly came to the same conclusion reached by the three judges. It said (R. 448):

"The Piedmont and Northern is certainly an interurban electric railway in the sense that it runs between cities. It is certainly an electric railway, in that its equipment and trains are motivated by electric power. We finally conclude that while it is closely tied up by existing traffic agreements, some of them highly perferential, yet its independence of control and operation is such as to keep us from saying that it is operated as a part of *any* general steam railroad system of transportation.* But if we allow such a literal construction to control us, we cannot help but feel that we would be flying directly in the face of the remedial purpose of the entire Transportation Act. We feel, further, that to do so would be to disregard the rule of construction of this particular statute which has been laid down for us by the United States Supreme Court. Further than that, the help which we have been able to get from the reports of committees and debates in Congress when the Transportation Act was being considered, clearly indicates that

*We deal with this reasoning in a later section of this brief, Point II, p. 100. Italics in the quotation are ours.

> Congress never intended to deprive the Commission of jurisdiction over extensions by a major interstate carrier of such importance as the Piedmont and Northern is shown to be."

As showing the exact parallelism between the reasoning of the Santa Fe in the *Texas & Pacific Case* and that of the Piedmont & Northern in the present case, and the identity of the principles of statutory construction involved in the two cases, it is pertinent to quote, in connection with the language of this Court in that case and the opinions of the three-judge court in the former, and of the District Court below in the present, Piedmont & Northern cases, the following from the opinion of the District Court in the *Texas & Pacific Case,* 298 Fed. 488, reversed by the Circuit Court of Appeals, 4 F. (2d) 904, but in turn reversed by this Court, affirming the District Court:

> "This brings us to the real difficulty in the case, the 'true character of the track' in issue, which difficulty springs out of and is accentuated by the fact that the terms 'extension of line of railroad' and 'industrial track' have no clear and established restrictive definition, either in dictionaries or in railroad practice, which will permit of the case being settled by rule of thumb, but, on the contrary, these terms have a wide latitude of meaning, according to the context in which they are used. Since Congress has not undertaken to define the words used, and since it is plain that they may be, according to the angle of approach, given wide and varied meaning, it is evident that the purpose of the act must be drawn from its entire structure, and that purpose, together with the context in which the words are used, must at the last be the guide to the interpretation of the words at issue."

Holding that the provisions of paragraph (18) must be construed broadly and those of paragraph (22) narrowly, in the light of the paramount purposes of the legislation, that court then said:

"Defendant, on the other hand, seizes on the words in paragraph 22 as indicative of the real purpose of Congress—that is, to keep the hands of the Commission off of extensions which are not clearly shown to be connected with all of the incidents of a complete railroad service—and from this angle they have no difficulty in showing that this line of theirs is merely an industrial track, because its whole purpose is to serve industries. It has no stations, no scheduled service, no passenger nor general freight traffic. This difference in the angle of approach is amply sufficient to account for the controversy between the parties, and the giving by me of full recognition to the effect of this difference in approach has enabled me to reach my conclusion, and to feel that, if my angle of approach is right, my conclusion must be sound.

"If, as I believe to be the case, paragraph 18 is the controlling portion of the act, and the purpose there expressed to make the public good, rather than the competitive instinct of railroad companies, the determining factor in the matter of whether substantial capital additions to existing railroads and substantial capital outlay in launching new roads shall be incurred, then in any case of complaint against the proposed addition to the capital account of a railroad company for the construction or extension of a line of road, which construction or extension is not sanctioned by a certificate of the Commission, an injunction ought to issue unless the constructor can satisfy the court that the construction is clearly within the exception to or limitation upon the statute, and is a side track, spur track, switch track, or industrial track, as contemplated and provided for in paragraph 22 of the act."

And, after quoting the master's findings of fact as to the character and extent of the traffic to be carried over the track claimed by the Santa Fe to be an "industrial track," and as to the invasion of the Texas & Pacific's territory thereby, that court concluded:

"Against this formidable array of facts tending to emphasize the importance, from a traffic and operat-

ing and a capital investment standpoint, of this construction, the defendant presents with force and vigor the consideration that nothing matters to this inquiry except the fact, which seems to be admitted, that these tracks are for the present, at least, to be used only for industrial purposes. They say, 'By their fruits ye shall know them;' they ask 'Do men gather grapes of thorns, or figs of thistles?' and say that a track which is constructed for the sole purpose of, and is devoted only to, the service of industries, is and can only be an industrial track.

"We are thus brought back to the beginning of the inquiry, and we conclude, as we began, that, if considering the words with their context, and in the light of the purpose of Congress, the court is authorized to give to them the broadest meaning of which they are susceptible, the defendant is right, for a track which serves only industries is in one sense certainly an industrial track.* But this, in my opinion, the court is not authorized to do, for not only does the principle 'noscitur a sociis' (see Bear Bros. v. Marx, 63 Tex. 298; Black on Interpretation of Laws, p. 194; Brown v. City of Galveston, 97 Tex. 1, 75 S. W. 488; U. S. v. Chase, 135 U. S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117; Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114) require a different construction; not only does the fact that paragraph 22 is in the nature of a proviso (U. S. v. Dickson, 15 Pet. 141, 10 L. Ed. 689); but that sixth sense for the interpretation of statutes, and the application and enforcement of statute law in the courts, which the Supreme Court in Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and United States v. American Tobacco Company, 221 U. S. 107, 31 Sup. Ct. 632, 55 L. Ed. 663, calls the 'rule of reason,' requires the court to refuse to give to the word 'industrial' as here used, the broad and comprehensive meaning contended for."

The Circuit Court of Appeals for the Fifth Circuit, reversing the District Court, in the opinion which this Court

*Just as an electric railroad which runs between cities, no matter how important it be, is an "interurban electric railway" within the broadest meaning of that term. (Foot-note ours.)

in turn reversed, 4 F. (2d) 904, approached the facts of the *Texas & Pacific Case* from the opposite viewpoint, from the viewpoint from which petitioner's briefs view our present case, stressing the proviso or exception of paragraph (22) rather than the essential regulatory provision of paragraph (18). It relied on court opinions and actions of the Commission as showing that such trackage as was there involved had been "customarily" referred to as an industrial track. It interpreted paragraph (22) as "withholding power" of the Commission over all trackage which had generally or customarily been referred to as industrial tracks prior to the enactment of the Transportation Act. And it rejected the argument that paragraph (22) should be narrowly construed in the light of the legislative policy of the Act, in these words, which sound like a direct paraphrase from petitioner's brief in this case:

> "Such a consideration cannot properly prevail in the case of a proposed enlargement of trackage which is found to be within the meaning of the explicit provision of the above-quoted paragraph 22. It is not for the courts, by giving to descriptive words used in that paragraph meanings narrower or less inclusive than such words customarily had at and prior to the date of the enactment, to reach the same result as would be effected by an amendment of the statute."

But this Court held that such a consideration did prevail, rejected the considerations on which the Circuit Court of Appeals relied, and rejected the viewpoint from which that court had approached the facts and the construction of the statute.

The same considerations are relied on by the petitioner here as those rejected by the District Court and by this Court in the *Texas & Pacific Case*. Petitioner approaches and argues this case from the same philosophical and logical viewpoint from which the Circuit Court of Appeals approached the *Texas & Pacific Case*. It argues that

court decisions in other connections had referred to electric railroads other than electrified portions of steam railroads on the one hand, and street and suburban railways on the other hand, as "interurban electric railways." It argues that census reports have referred to it and railroads similar to it as "interurban electric railways." It argues that the Labor Board held it to be such under the Labor Board Act. It argues that such railways were generally and "customarily" referred to as "interurban electric railways" prior to and at the time of the enactment of the Transportation Act. It argues that the decision of the District Court below amounts to judicial legislation under the guise of statutory construction, and that it is not for courts, by giving the words "interurban electric railways" in paragraph (22) a meaning "narrower or less inclusive than such words customarily had at and prior to the date of the enactment, to reach the same result as would be effected by an amendment of the statute," that it is for Congress, not the courts, to narrow the literal language of the exception.

We submit that all these arguments are conclusively answered by this Court in its opinion in the *Texas & Pacific Case.*

As the District Court said in that case, it will not do to seize upon the words in paragraph (22)—literally and as if standing alone—"as indicative of the real purpose of Congress." The controlling portion of the statute is paragraph (18), and paragraph (22) must be given the usual narrow construction of a proviso in the light of all the context of the Act and in the light of the major legislative purposes.

It would take the broadest and most comprehensive meaning of the words of paragraph (22) to cover the petitioner and its extensions here involved. Petitioner frankly argues for the broadest of all possible meanings of "interurban electric railways." It asserts that the expression means any independently operated and owned

electric railroad, not the electrified portion of a steam railroad, no matter how extensive its line or how preponderant its interchange, national freight traffic. The exigencies of its case demand that its assertion go that far. For if the extensions here involved, of a railroad of the character here involved, are within the proviso of paragraph (22), then it is inconceivable that any independent electric railroad would not be. If petitioner is within the proviso, then no line can be drawn, and if a railroad is independent and electric it is free to extend *ad libitum*, no matter how extensive its scope or how nationally important its traffic.

The rule of reason instantly rejects the thought that Congress intended to leave such a railroad as petitioner free to make such extensions as are here enjoined without certificate of the Commission. The application of the doctrine of the *Texas & Pacific Case* instantly rejects that thought.

No more perfect example of invasion of territory already adequately served and violation of the purposes of the Transportation Act could be imagined than is presented in this case. Here a carrier, broadly engaged in a general interstate, interchange business of national importance, from which it already derives revenues putting it in the group of Class I railroads of the United States, seeks, without federal approval, to build extensions which will give it a continuous line from the center of one state to the center of another state, which will directly parallel and duplicate the facilities of existing adequate carriers, which will invade a traffic field new to petitioner, which will open up to it new through routes for national traffic, will make it more completely than ever a part of the general steam railroad system of transportation of the Southeast, and which will actually make it the interior connecting link in a new trunk line of connecting carriers running throughout the whole Southeast. And yet it contends that under a literal interpretation of the words "interurban

electric railway" in paragraph (22) it is entirely free to do this without federal certificate, and no matter to what extent it affects national transportation and diverts traffic of a national character from existing routes and channels.

If the seven-and-a-half mile and wholly intrastate extension of the Santa Fe, leading to serve only certain particular industries in a small and wholly intrastate territory, was held not to be an industrial track located wholly within one state, because it violated the remedial purposes of the Transportation Act, how much more must the petitioner be held to be not an "interurban electric railway, which is not operated as a part or parts of a general steam railroad system of transportation," being already engaged in business of the national scope and importance shown by the facts in this case, and proposing to more than double the extent of its national business and to double the amount of revenues it diverts from other carriers, by more than doubling its length of interstate line and connecting up more immediately as an actual part of a new effective trunk line through the Southeast.

Petitioner attempts on brief to avoid the controlling effect of the decision in the *Texas & Pacific Case* by calling attention to the fact that the expression "located or to be located wholly within one state" grammatically modifies only the exception of "spur, industrial, team, switching, or side tracks" particularly construed in that case, and does not modify the other part of the sentence here in question, the exception of "street, surburban or interurban electric railways." The suggestion is that this constitutes a difference in scope of the two exceptions which would render this Court's construction of the first inapplicable to the second.

In passing we state what will be elaborated in the second main head of this brief, that while the expression "located or to be located wholly within one state" was used with reference to the exception of spur, industrial,

team, switching or side tracks, evidencing the intention to confine the scope of that exception to trackage of only purely local significance, not directly bearing upon and affecting national transportation and the national transportation system, and not of a character to conflict with the remedial purposes of the statute, Congress similarly modified the exception of "street, suburban, or interurban electric railways" by the limitation "which are not operated as a part or parts of a general steam railroad system of transportation," an expression equally apt to limit the scope of that exception to railways and trackage of purely local significance, not of a character to conflict with the purposes of the Act, and not really operated as a part of that which was sought to be fostered and preserved, the general steam railroad system of transportation. The use of that limitation on the exception as to electric railways was the expression of the same *rationale* for exclusion as that expressed by the use of "located or to be located wholly within one state."

The Santa Fe's proposed track would have been located wholly within one state. Had the decision and the statutory construction turned on that language and that fact, the Santa Fe would have been free to build the track without certificate. This Court held the track was within paragraph (18) and not within the meaning of paragraph (22) *in spite of the fact that it would be wholly intrastate* and because the track and the business to be carried over it were of a character to conflict with the purposes of the Transportation Act, and because the track was not, therefore, what was *meant* to be excluded by paragraph (22), whatever it may have been within loose and general meaning of the words used.

So that decision cannot be distinguished, as petitioner attempts to distinguish it, on the theory that the words "located wholly within one state" in paragraph (22) modify only "spur, industrial, team, switching or side tracks," and not "or of street, suburban, or interurban

electric railways, which are not operated as a part or parts of a general steam railroad system of transportation," and that to that extent those words constitute a difference in treatment. This Court's decision did not turn on such distinction, if it exists, since the trackage there involved was wholly within one state. The District Court's decision below did not turn on either the recognition or rejection of such distinction. And the extensions of the petitioner here enjoined would not be located within one state. They would be interstate extensions.

And they would, furthermore, clearly be operated as parts of the general steam railroad system of transportation of the territory and of the United States, just as much so as if they should be operated by steam.

Petitioner argues by a process of elimination: that it is not a steam railroad; that it is not a street or suburban electric railway; that it is not the electrified portion of a steam railroad; *ergo*, that it must be an interurban electric railway, because there is no other class in which it can fall. Just there lies the fallacy, in the assumption that there is no other class in which to fall.

Petitioner is an independent, standard, freight carrying electric railroad, operated in connection with steam railroads and as an important part of the general steam railroad system of transportation of the Southeast and of the nation. Its business is the same as that of steam railroads which are important links in the national system. Paragraph (22) cannot be read to exclude from Commission authority a railroad of that class.

If paragraph (22) is to be construed as exempting petitioner and the enjoined extensions from the requirement of paragraph (18) then the purpose of the exemption would have been much more accurately expressed by such words as, "or of electric railroads not owned or operated by a steam railroad." If petitioner is exempt, any independently owned and operated electric railroad would be exempt, no matter what its size, scope and importance.

But Congress did not write such an exemption into the statute. It cannot be written into the statute by construction.

Applying the rules of construction this Court has laid down in the above cases, petitioner and its enjoined extensions clearly fall within paragraph (18) and not within paragraph (22).

First, construction in the light of the context. The question in this case cannot be answered by isolating the three words "interurban electric railways" from their context and applying a literal or a liberal construction to them. They are used in the paragraph in immediate context with "street, suburban," and with "which are not operated as a part or parts of a general steam railroad system of transportation." The expression "or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation" comprises one excepted class. The context of street and suburban with interurban electric railways is eloquent as to the kind of railways intended to be excepted.

Again, this whole expression is in immediate context with, a part of the same sentence with, "spur, industrial, team, switching or side tracks, located or to be located wholly within one state." This context is likewise eloquent as to the character of extensions or abandonments intended to be excluded from regulation. The whole of paragraph (22) defines one excepted class and manifestly the same *rationale* for exclusion runs through it.

This becomes even more clearly manifest when the language of the paragraph is related to the remedial purposes of the whole Act, as this Court has declared it must be related.

And, finally, when to construction in the light of the context, and to construction in relation to the remedial purposes, there is added the third rule, that the remedial provisions must be liberally construed and the exception

provisions narrowly or strictly construed, there can be no reasonable doubt that there was no intention by Congress to exclude a railroad and extensions of the character here shown, and that the decree below was right.

The intention of paragraph (22) was to leave free from certificate authority construction and abandonment only of such trackage as is of purely local importance, of no substantial effect on the general interstate transportation system, and not calculated to accomplish the evils sought to be remedied by paragraphs (18) to (21) and by the other remedial provisions of the Transportation Act.

One of the four asserted grounds on which certiorari was sought was that the District Court, in treating the opinion of this Court in the *Texas & Pacific Case* as controlling the decision in this case, carried the doctrine of that opinion too far. We submit that the District Court took that decision just as it was written and carried it no further than it necessarily carries itself *ex propria vigore*. We think the decree below could not be reversed without overruling the *Texas & Pacific Case*.

3. The decision below does not conflict with this Court's decisions in Omaha & C. B. Street Ry. Co. v. I. C. C., 230 U. S. 324, and in United States v. Village of Hubbard, 266 U. S. 474.

Another of the four grounds on which certiorari was petitioned was an asserted conflict of the decision below with this Court's decisions in the *Omaha Street Railway Case, supra*, and in the *Village of Hubbard Case, supra*.

In neither of those cases did this Court undertake to draw a line of distinction between the class of "street, suburban, or interurban electric railways" and the class of electric railroads which are more than interurbans and are in the same category as to business and effect on national commerce as interstate steam railroads. In both, the Court drew an altogether different line, that between

street railways, which are not regulated by the Interstate Commerce Act, and interurban electric railways and other electric railroads, which are within the Act.

The questions involved in those cases were quite different from the question here involved and nothing that was said in them was inconsistent or in conflict with the decision below or with this Court's decision in the *Texas & Pacific Case* which controlled the court below. If there were such conflict, the decision in the *Texas & Pacific Case*, being the latest, would still control. But we see no such conflict.

The *Omaha Street Railway Case* was decided years before the enactment of Transportation Act, 1920, to-wit on June 9, 1913. It drew the line of distinction between street railways, which were not subject to any regulation by the Interstate Commerce Commission, and electric railroads, which were subject to its regulation as being "railroads" engaged in interstate commerce. The specific holding was that a street railway, built in streets and not on private right of way, having no power of eminent domain, and engaging in, and authorized to engage in, no freight carriage, but doing only a passenger business, was not a "railroad" as that term was used in the Act to Regulate Commerce and hence was not subject to Federal regulation even though it carried passengers on street cars across a state line.

In holding that, this Court merely distinguished such a street railway from interurban railways with electric motive power which are "railroads" and, as such, subject to the Act to Regulate Commerce if engaged in interstate commerce. No attempt was made to draw the line within the general class of electric "railroads" subject to Federal regulation, distinguishing between those properly classed as "interurbans" and those outside such class.

The *Village of Hubbard Case* was decided after the passage of the Transportation Act, to-wit on January 5, 1925. But there again this Court did not attempt to draw

the line of demarcation between electric railroads properly classed as "interurban electric railways" and electric railroads which cannot properly be so classed under the provisions of the Transportation Act.

The precise holding there was that the Interstate Commerce Commission had jurisdiction, under the Act of 1887 to Regulate Commerce, to prevent discrimination against interstate commerce by an interurban electric railroad even though not engaged in the general transportation of freight. There again the court simply gave its attention to the line of distinction between street railways, not subject to Federal regulation at all, and interurban electric railways which are subject to Federal regulation.

The court did there comment, in support of its holding that the Commission had power to regulate interurbans, on the different provisions of the Transportation Act referring to interurbans, *as negativing an intention to exclude such carriers from Federal regulation.* There was no attempt to draw the line here involved, within the general class of electric railroads subject to Federal regulation, between those railroads properly classed as "interurban electric railways" within the various inclusion and exclusion provisions, on the one hand, and, on the other, electric railroads properly in the same category for regulation as steam railroads and hence not within the class of "interurban electric railways," excluded by some provisions of the Transportation Act from, and included by other provisions in, specific regulatory powers of the Commission.

Nowhere in the opinion in that case is there an intimation that an electrically operated freight carrier of the national importance of the Piedmont & Northern is to be deemed an "interurban" within the meaning of paragraph (22) or of any other of the statutory provisions referred to. Nowhere in the opinion is there any intimation that the court considered that, under the guise of extensions of an "interurban electric railway," it is open to an in-

dependently operated freight carrier of the character of the Piedmont & Northern, without federal supervision, to connect up with new steam road connections and form a new paralleling and competing trunk line of carriers of the scope and national importance shown to be proposed on this record.

The only significance of that case here from the standpoint of the petitioner seems to be that the Court said (pp. 479-480): "Transportation Act, 1920, c. 91, 41 Stat. 456, enlarged in several respects, the powers of the Commission, and dealt also in other ways with carriers engaged in interstate commerce. In doing so, it provided expressly in five sections for the exclusion of certain electric railways from the operation of the powers conferred; and it also differentiated interurban electric railways from street and suburban railways by specific reference to each, although a distinction in treatment was made in only one case"; and that the court appended to this passage of the opinion foot-note 7 in which it matched up the varying provisions of section 422 (15a); section 402 (sec. 1, par. 22); section 439 (20a); section 209; and section 300.

In doing this the court merely placed the sections side by side and adverted to internal distinctions between street, suburban and interurban railroads, and between various kinds of interurbans, all of them within the language of the various sections.

The court did not have its attention upon and was not considering the outside dividing line between "interurbans", variously excepted or not excepted by the varying qualifying language of the five sections of the Act, and those electric railways which are outside of any reasonable classification as "interurbans" and hence excluded from federal regulation by none of the sections referred to. It is that outside dividing line which is to be surveyed here.

There was in that case no intimation that the court considered that all electric railways are within the term

"interurban" as used with divers qualifications in all five sections.

Foot-note 4 to the opinion is far more significant of what the court understood to be included within the general term "interurban" since it points out that of 267 operating "interurbans" which filed reports for 1917, 40 did not report any freight revenue, and that of the total revenue of the 267, only 9.4 per cent was freight revenue.

Manifestly the court in referring to "interurbans" was referring to a class of railroads vastly different in character from the Piedmont & Northern.

The *Hubbard case* dealt generally with all electric railroads which are outside the strict class of street railways and which hence were within the powers of the federal commission to regulate. It did not treat that general class as in any wise being limited to "interurbans," but only as being different from unregulated street railways and as including "interurbans". The fact that the regulated class was considered as *including* interurbans in no way indicates that the Court meant that it was *confined* to interurbans and that any railroad within that regulated class should be considered as an interurban. The court used both the expression "electric railroads" (p. 478) and the expressions "interurban electric railroads" and "interurban roads". What it held was that all electric railroads outside the class of street and suburban railways were subject to federal regulation, and that included within that class of electric railroads were "interurban electric railroads."

It would be a strange anomaly to draw from that holding the conclusion that any electric railroad within the class held to be subject to federal regulation is by that very fact to be held to be an "interurban" excluded from federal regulation of extensions by paragraph (22).

4. The argument based on comparison of the slightly varying exclusion provisions of section 1, paragraph (22), and of sections 15a, 20a, 73, and 77, does not lead to the conclusion asserted by petitioner.

For convenience we refer to these sections here by their section numbers as they now appear in Title 49, U. S. C. This argument is one of the four grounds upon which certiorari was petitioned.

Petitioner compares, as being substantially alike, the exclusion language contained in the following:

> Section 1, paragraph (22)—"or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general railroad system of transportation."
>
> Section 20a, paragraph (1), as to securities—"(except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation)."

It contrasts with those two provisions the following two exceptions:

> Section 73, paragraph (a), defining "carriers" under the provisions for reimbursement of federal control deficits with the proviso: "but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;"
>
> Section 77, paragraph (a), defining "carriers" under the provisions for guaranty after termination of federal control, and similarly providing: "but does include a street or interurban electric railway not under Federal control on February 29, 1920, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;"

It notes the expression "not under Federal control on February 29, 1920," which appears in the definition in Section 77 but does not appear in that in section 73.

And finally it contrasts with all those exclusion provisions that contained in section 15a, defining "carriers" under the fair return and recapture provisions, but

> "excluding * * * (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight,"

Imputing to Congress the most refined concentration on precision in choice of language in these scattered exclusion provisions in divers sections of the Act governing different subject-matters, and a nicety of comparative phraseology rare in legislative proceedings, the argument is built up from this critical comparison as follows:

1. The omission of the reference to federal control in section 73 and the use of the words "not under Federal control" in section 77 shows that Congress recognized that there were some "interurban electric railways" which were taken over, and others which were not taken over, under federal control.

(Petitioner was taken over as an interstate carrier and was operated by the Director General under federal control; it was one of only six independent electric lines so taken over, R. 410.)

2. The use in sections 73 and 77 of the modification "which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat and light, or both," shows the intention of Congress not to exclude from the deficits and guaranty provisions "interurban electric railways" which have as their principal source of operating revenue passenger traffic; thus recognizing that there were within the class known to Congress as "interurban electric railways" some railways deriving more than half their revenues from passenger traffic and others deriving more than half their revenues from freight traffic.

3. From this, and from the fact that the modification contained in sections 73 and 77 does not appear in section 1, paragraph (22) or in section 20a, it is argued that the fact that more than half an electric carrier's revenues are from freight, rather than from passenger traffic, does not take it out of the exclusions of section 1, paragraph (22) or of section 20a, provided it is not operated as a part (or parts) of a general steam railroad system of transportation.

4. From the above considerations, and from the added fact that Section 15a contains a modification additional to that contained in section 1, paragraph (22) and in section 20a, to-wit the modification "or engaged in the general transportation of freight," it is argued that Congress understood the class of "interurban electric railways," variously referred to in the five sections, as including electric railroads not operated as a part of a general steam railroad system of transportation but which engage in the general transportation of freight, even to the extent of deriving more than half their operating revenues from freight traffic.

Upon this reasoning petitioner leaps a wide gap to reach a conclusion not supported by the premises and the deductions of the reasoning: that the petitioner and its enjoined extensions are freed from Commission regulation under section 1, paragraph (18), by the language of paragraph (22).

In the first place, if this Court holds, as we think it must upon the facts, that petitioner's lines are now, or as extended would be, "operated as a part or parts of a general steam railroad system of transportation" (see Point II, *infra*), then the whole of the above argument falls to the ground, for then petitioner expressly is not within the exclusion of paragraph (22), whether it be an interurban or an electric railroad *more than an interurban,*

as its traffic manager swore it was (R. 179*), whether an electric railroad engaged in the general transportation of freight and deriving more than 50 per centum of its revenues from freight is or is not within the term "interurban electric railway" in the various sections, and regardless of all the other comparisons.

A proper consideration of the manifest meaning of the expression "which are not operated as a part or parts of a general steam railroad system of transportation," of the legislative history and the context of the statute, as showing that by using those words Congress sought to make clear that it was not excluding such a railroad as this either from regulation of extensions and abandonments by paragraph (22) or from regulation of securities issues by Section 20a, or from fair return and recapture provisions by 15a, in all of which sections that language appears, will clarify the whole case, harmonize the five sections entirely, and bring them all squarely in line with the controlling legislative policy of the Act. The Act should be construed so as to harmonize the various sections, not so as to accentuate minor verbal distinctions between various exclusion provisions.

The carefully reasoned, and entirely sound, answer which the three-judge court gave to petitioner's elaborate argument on the comparison of the five sections, 30 F. (2d) 432-433, would have been entirely unnecessary had that court given the natural, grammatical, and manifest construction to the modification, "which are not operated as a part or parts of a general steam railroad system of transportation," and had it interpreted that clause as all

*Mr. Cureton, Traffic Manager of the Piedmont & Northern, testified before the Commission, his testimony being introduced on the trial below, that he considered "the Piedmont & Northern Railway as an interurban railroad plus; it performs all the characteristic service of an interurban railroad and equals that of the standard railroads in other respects * * * essentially and in the large, the P. and N. is a freight carrier, and it is from freight that it gets its revenue, and that is the source it expects to get its revenue from when extended. The great majority of freight on the P. & N. is interstate." (R. 179.)

the context, the policy, and the legislative history of the Act shows it should be interpreted.

But pretermitting the question of the proper construction of "which are not operated as a part or parts of a general steam railroad system of transportation," and eliminating that clause from consideration, still the argument of petitioner entirely fails to reach the conclusion sought.

It must be remembered that all these exclusion provisions are provisos or exceptions from the regulatory and remedial provisions of the Act. Not only does the doctrine of *Spokane-Inland Empire R. Co. v. United States*, 241 U. S. 344, forbid a liberal or broad construction of an individual exception in a remedial act but *a fortiori* it forbids a hypercritical gathering together of different exceptions in different remedial provisions governing different subject-matters and a broad construction of all of them together to give a broader exclusion effect to one of them than it would have standing alone. That is one step further in error than the construction denounced in the *Spokane-Inland Empire Case*.

But leaving the rule of liberal construction of the remedial provisions and strict construction of provisos entirely aside, where does the extreme logic of petitioner's argument lead?

The argument based on the exceptions in Sections 73 and 77 goes no further than a conclusion that an "interurban electric railway" may have as its principal source of operating revenue something other than urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both. The inference goes no further than that an electric carrier may still be classed as an "interurban electric railway" within the meaning of the five provisos even though its principal operating revenues come from *urban, suburban,* or *interurban freight* and *express.*

No inference can be drawn from comparison of sections

73 and 77 with the other three sections that Congress understood "interurban electric railways" to include an electric carrier deriving the principal part of its operating revenues from *interstate freight*. *A fortiori* this comparison gives rise to no inference that Congress classed as an interurban an important electric railroad operated as a feeding and connecting line in connection with large interstate steam railroad systems, operated as an important link in the general steam railroad system of the territory, a Class I carrier performing the same business as the interstate steam roads, 94.5 per cent of whose revenues are from freight, 95.7 per cent of whose freight is interline, interchange freight moving to and from distant points all over the country, and only an inconsiderable portion of whose business is local, urban, suburban, or interurban business, freight and passenger.

The broadest construction of those exceptions falls far short of the conclusion sought to be reached.

Nothing remains except the comparison between the exceptions in 15a and in section 1, paragraph (22) and section 20a, the use in 15a alone of the modification "or engaged in the general transportation of freight" in addition to the modification as to operation as a part of a general steam railroad system of transportation which appears uniformly in all three.

It is clear that no electric carrier which is operated as a part of a general steam railroad system of transportation is exempted by either of the provisos, by paragraph (22) from the provisions of paragraph (18) as to extensions and abandonments, by 15a as to the fair return and recapture provisions, or by 20a as to security issues.

It is further clear that any electric carrier which is operated as a part of a general steam railroad system of transportation will necessarily be engaged in the general transportation of freight. So as to such carrier the additional modifying clause in 15a is without significance.

Manifestly some significance must be given to the added

modifying clause in 15a which does not appear in 20a or in paragraph (22). It means that some carriers may be within the fair-return and recapture provisions which do not come within the Commission's authority over extensions, abandonments and security issues. But this added modification is not to be expanded beyond its proper and necessary effect. What kind of carrier, engaged in the general transportation of freight, but not operated as a part of the general steam railroad system of transportation, was contemplated by Congress as properly coming within the fair value and recapture provisions but as not coming under the Commission's authority as to extensions, abandonments, and securities issue?

Certainly *not* such a carrier as the Piedmont & Northern. An illustration may suggest what *was*.

Suppose a short, truly interurban electric line, running from a city in one state near the line to a city just across the line in the other state. It is not operated as a part of the general steam railroad system of transportation. It does not connect with, or does not interchange substantial freight with, interstate steam carriers. It is not a link in the general system of transportation sought to be fostered and preserved by the new legislative policy of the Transportation Act. Yet its principal revenues are derived not from passenger traffic or from sale of power, heat and light, or both, but from the general transportation of freight between the two cities. It handles all classes of commodities between the two cities.

Its business, therefore, although of national concern in the sense that it is technically interstate commerce and hence within the federal jurisdiction under the commerce clause (see *Texas & N. O. R. Co. v. Northside Belt R. Co.*, 276 U. S. 475, 479), yet for all that is distinctly local and essentially "interurban" in character. It is devoted to service between the two cities, and that is what "interurban" means, just as "suburban" means service between

a city and a suburb, and as "urban" means service within a city.

Or the illustration may be changed without changing its effect. Postulate the same sort of carrier between the two cities in the same state, similarly engaged in the general transportation of freight between the two. Yet without interchanging substantial national traffic and without operating as a link in the steam system it does handle some freight between the two cities which has origin or destination without the state. Without doing a substantial or predominant business of a national scope, it is yet carrying interstate commerce and hence is within the commerce clause and generally within the act to regulate interstate commerce.

In either postulated case the carrier is within the Federal Employers' Liability Act, the Safety Appliance Act, and other such general regulations. Being engaged in interstate commerce it is within the legislative purposes of the fair return and recapture provisions of 15a.

But in either case, suppose the carrier desired to make a short extension of its line to reach another adjacent city, to extend the interurban service without changing the essential character of the business. Such extension would be of purely local and "interurban" importance. It would require no issue of securities, or no considerable issue. It would have no effect on the general market for railroad securities. It would invade no interstate traffic territory of interstate carriers. It would have no substantial effect on the national transportation system. It would make no changes in the currents and routes of national traffic. It would injure no other carrier. It would furnish an additional local freight service of a general nature not previously furnished. It would not conflict with the remedial purposes of section 1, paragraph (18) and of section 20a. Yet all the while it would be within the purposes of 15a.

There may or may not be such carriers in existence.

Evidently Congress contemplated the possibility that there might be and took care of the possibility by the additional modifying clause in 15a.

But no logical inference can be drawn therefrom that it intended to bring within 15a and to exclude from section 1, paragraph (18), and from section 20a, a carrier of the character and importance of the Piedmont & Northern, proposing extensions of the importance shown on this record.

Again, the language of the court of three judges is highly significant, regardless of the want of procedural jurisdiction. The opinion of Soper, J., completely answered petitioner's argument erected upon the critical comparison of the five provisos. It was there said, 30 F. (2d) 432-433, setting out the various exclusion provisions in a foot-note:

> "Congress has been careful, however, in various enactments, to distinguish between general steam railroads and interurban electric railroads, and also between members of the latter class with reference to the character of business done. In a number of instances, electric railroads have been excluded from the benefits provided or the authority conferred upon the Commission by the statutes. It is apparent from these enactments that the carrier described by Congress as an interurban electric railway is one which may have one or more of the following characteristics: (1) It may be operated as part of a general steam railroad system of transportation. (2) It may have as its principal source of operating revenue, passenger traffic or sale of power, heat, and light. (3) It may have as its principal source of revenue, freight traffic. (4) It may be engaged in the general transportation of freight. (5) It may make through traffic arrangements with steam railroads and thereby increase its freight business.
>
> Moreover, it is clear that engagement by an interurban electric railway in the general transportation of freight does not of itself bring the carrier within the jurisdiction of the Commission over the construc-

tion and extension of railroad lines. No other conclusion can fairly be drawn from the fact that an interurban electric railway, engaged in the general transportation of freight, is expressly kept within the rate-making power given to the Commission by Section 15a, but such a carrier is not mentioned at all in the exception set out in paragraph 22 of section 1. Hence the petitioner, bearing in mind that the Piedmont & Northern performs the service of an interurban electric railway and engages in the general transportation of freight, contends that the railroad is within the exception of paragraph 22 and is at liberty to extend its lines without the Commission's consent. But these considerations do not necessarily lead to the conclusion sought to be reached. It is true that an interurban carrier may be entitled to that descriptive name although it participates in general freight traffic; but it does not follow that every electric carrier so engaged, is an interurban railroad. Freight traffic may be limited in extent and within the scope of a carrier devoted primarily to local business, and at the same time be general in its nature. The carrier may transport the kinds of property usually carried by steam roads in addition to the carriage of baggage, mail, and express, and yet be so restricted in its operations that it may not be properly classified with general steam carriers whose operations cover a wide field. See the discussion in Lackawanna & Wyoming Valley Ry., 105 I. C. C. 178.

The difference in language between the exception in section 15a and in the exception in section 1, par. 22, may not be ignored, but it is accounted for by the fact that in one case Congress was dealing with rates, and in the other, with the construction of new lines. It evidently concluded that if an electric interurban road should build up a business of transporting property to such an extent as to be engaged in the general transportation of freight, it should be included in the general rate adjustment provided in section 15a with a view to uniformity of rates and the connection of the carrier with steam railroads. On the other hand, Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, and should be

engaged in the local carriage of passengers and freight, as its primary business, the extension of its line would remain a matter of local concern and should be left to the regulation of local authority."

The District Court below expressly followed the reasoning and conclusions of the three judges, although relying upon its own independent judgment entirely apart from any influence of that court's opinion, and in effect adopted Judge Soper's opinion as a correct exposition of the law. (R. 437, 442.)

We submit that it was correct in so doing.

Sections 15a, 73 and 77 are not *in pari materia* with section 1, (18) to (22), and section 20a. They deal with wholly different subject matters. It violates the accepted rules of construction to attempt by too literal and critical a comparison of their provisos to read into the provisos of section 1, paragraph (22), and of section 20a, a breadth of meaning wholly in conflict with the remedial provisions and legislative policies embedded in the essential provisions of those sections. Section 1, paragraphs (18) to (22) and section 20a are *in pari materia.* These provisos are wholly indistinguishable *inter sese.* No difficulty arises from their comparison.

The presumption is that a proviso in a statute refers only to the provision to which it is attached.

United States v. Morrow, 266 U. S. 531.

The rule for construing together different sections of a statute as in some degree showing the meaning of both, applies only where the sections are *in pari materia.*

Hall v. Russell, 101 U. S. 503.
United States ex rel. Chott v. Ewing, 237 U. S. 197.

For the proper construction of a proviso in a statute, consideration need not be limited to the subdivision in

which it is found, but the general purpose of the statute may be taken into account.

McDonald v. United States, 279 U. S. 12.

As between two possible interpretations of a proviso in a statute, the court will lean toward that one which withdraws the less cases from the operation of the statute.

Ryan v. Carter, 93 U. S. 78.

A proviso carves special exceptions only out of the body of the act. It is to be strictly construed and takes no case out of the enacting clause which does not fairly fall within its terms. Those who set up any such exception must establish it as being within the reason of the exception as well as within the words thereof.

United States v. Dickson, 15 Pet. 141.
Ryan v. Carter, 93 U. S. 78.
United States v. Ewing, 140 U. S. 142.
Schlemmer v. Buffalo, etc., R. Co., 205 U. S. 1.

A statute will not be construed according to a single sentence or member of a sentence, or by detached words and phrases, but according to all the provisions of the act, its object and its policy.

United States v. Boisdore, 8 How. 113.
Gayler v. Wilder, 10 How. 477.

Effect must be given to all the language employed in a code, and inconsistent expressions are to be harmonized to reach the real intent of the legislature.

Inglehart v. Inglehart, 204 U. S. 478.

A doubtful clause in a congressional enactment should be construed so as to effect the general purpose of Congress manifested in the statute.

Porto Rico R., etc., Co. v. Mor, 253 U. S. 345.

The literal sense of words and their technical construction yield to the spirit and intention of the enactment.

The Habana, 175 U. S. 677.
Williams v. Gaylord, 186 U. S. 157.
American Tobacco Co. v. Werckmeister, 207 U. S. 284.
Fleischman Const. Co. v. United States, 270 U. S. 349.
Barrett v. Van Pelt, 268 U. S. 85.

Any secondary policy which Congress may have had in mind in the enactment of a statute ought not to be allowed to give it a construction which would embarrass or defeat the primary policy in view.

Platt v. Union P. R. Co., 99 U. S. 48.

A court will avoid a construction which would render a statute ineffective or inefficient, or which would cause public injury or even inconvenience, if another and more reasonable interpretation is present in the statute.

Bird v. United States, 187 U. S. 118.

The primary and essential policy of section 1, paragraphs (18) to (22), and of section 20a, was to put under the jurisdiction of the Commission extensions, abandonments, and security issues of interstate railroads for the purpose of preventing extravagance, unnecessary capital expenditures for duplicate lines not demanded for the public convenience and necessity and which the public would ultimately have to support, to prevent harmful and not needed paralleling of, competition with, and traffic diversion from existing lines, and to assure continuance of operation of lines needed by the public, all to promote and preserve for the people of the United States the great

national transportation system upon which they are dependent. It was no part of the essential purpose to discriminate in favor of railroads operated by electric motive power and to leave them, when engaged in the same essential business as the steam carriers, wholly free to accomplish all the evils against which the legislation was directed.

It was a secondary purpose of paragraph (22) to make clear that the essential regulation did not apply to those purely local tracks which had no substantial relation to the purposes sought to be accomplished, and a secondary purpose of that paragraph and of paragraph (1) of section 20a, to take out of the essential regulation a class of electric railways devoted to a peculiarly local, urban, suburban, and interurban type of business, not within the essential policy of the enactment, not calculated to accomplish the evils sought to be remedied. And this was made doubly sure by expressly denying that the exception gave immunity to any carrier operated as a part of a general steam railroad system of transportation.

Petitioner's argument would attempt, just as the Santa Fe's argument attempted in the *Texas & Pacific Case*, to treat the secondary purpose as the essential purpose, and to broaden the language expressing the secondary purpose to an extent which would be destructive of the primary and essential purpose.

Giving the utmost effect to the argument based on comparison of the provisos in different sections it utterly fails to show any intention of Congress to leave a carrier of the character and the importance of petitioner free to build without authorization such extensions as are here enjoined, in direct violation of the essential policy and purposes of the enactment, merely because its motive power is the more modern electricity rather than the more ancient steam.

5. All the light to be found in the legislative history of the Transportation Act supports the decision below and shows Congress did not intend to exclude such extensions of such a railroad as here enjoined.

The petitioner below placed much reliance on the legislative history leading up to the enactment of these various provisions of the Transportation Act, as supporting its position. It filed an elaborate brief reviewing phases of the legislative history, principally to show that by a series of amendments the expression "located or to be located wholly within one state" was moved up from the end to the middle of the sentence of paragraph (22), and the expression "which are not operated as a part (or parts) of a general steam railroad system of transportation" was by amendment uniformly written into that paragraph and into 15a and 20a. The District Court attached this brief to its opinion, as a note, and referred to it in its opinion. (R. 455, 458-486.)

These respondents relied below, and here rely, on the legislative history as supporting their position and as showing that Congress had no intention of excluding such a carrier and such extensions as here involved.

The District Court gave careful consideration to the legislative history. (R. 448, 454-455.) It said (R. 448):

> "Further than that, the help which we have been able to get from the reports of committees and debates in Congress when the Transportation Act was being considered, clearly indicates that Congress never intended to deprive the Commission of jurisdiction over extensions by a major interstate carrier of such importance as the Piedmont and Northern is shown to be."

We have in mind the limitations upon the extent to which the legislative history may be considered, the statement in *Railroad Commission v. Chi., B. & Q. R. Co.*, 257 U. S. 563, 588-589, for instance:

> "Committee reports and explanatory statements of members in charge made in presenting a bill for passage, have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure * * *
>
> "But when, taking the act as a whole the effect of the language used is clear to the court, extraneous aid like this cannot control the interpretation * * *.
>
> "Such aids are only admissible to solve doubt, and not to create it."

Also we have in mind the statement by the court in *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 650:

> "It is true, at least generally, that statements made in debate cannot be used as aids to the construction of a statute. But the fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the act, may properly be considered in determining what that purpose was and what were the evils sought to be remedied."

A consideration of the legislative history here, not to create doubts but to solve them, entirely supports the decision below. A review of the committee proceedings and of the reports to and debates in the houses of Congress, shows throughout a common agreement as to the great purposes of these provisions of the Transportation Act, as to the evils sought to be remedied, and that no such carrier as petitioner was ever contemplated in the formulation of the exception in paragraph (22). It further shows that no such carrier was comprehended within the common acceptation and meaning of the term "interurban electric railway" in general use at the time, or within any of the representations made to Congress as to such common or customary meaning and use of the term.

There was forcibly brought to the attention of the House Committee (Hearings before House Committee on Inter-

state and Foreign Commerce on H. R. 4378) in considering the various exceptions of "interurban electric railways," the distinction between companies incorporated as street, suburban, or interurban railways and companies incorporated as regular railroads with full powers of eminent domain and other full railroad powers.

Mr. J. D. Cornell, representing the Joplin & Pittsburgh Railway and Kansas City, Kaw Valley & Western Railway, electrically operated railroads, was before the committee contending that his railroads were electric railroads, not "interurbans", and requesting that such railroads be regulated like steam railroads. His roads were shorter and much less important from a national traffic standpoint than the Piedmont and Northern, but they were "chartered as regular railroads under the railroad act of Kansas" (p. 1948), they operated on private rights of way, they filed tariffs and made reports to the Interstate Commerce Commission, they interchanged carload freight with steam roads, had working arrangements, through rates and through billing with them, and 95 per cent of their business was interstate and only 5 per cent intrastate.

Mr. Cornell said to the Committee: "there is not one factor that differs in the operation of our line or the construction except that we are a modern, electrically operated railroad, instead of using steam. * * * Our railroad was financed as an electric railroad, and not an interurban, so that if the term interurban is to be construed as meaning any railroad operated by electricity then you are discriminating against electrically operated railroads, and in time to come, I believe they will all be operated by electricity. * * * Because we are operated by electricity does not, in my opinion, mean that we are an interurban line."

The Chairman of the Committee, Mr. Esch, the author of the bill, said (p. 1949), "Your idea is that you do not believe it should be a classification based on motive power?"

"Mr. Cornell. No; and covered by the word 'interurban.' If the line is a street railroad, not doing a business such as we are, not exchanging business with other lines, it might be an interurban, but we do an interchange business with these other lines that I have spoken of amounting to 600 cars a month. And so I say a railroad of that kind is not an interurban railroad, in my opinion, and I do not believe it is in the opinion of you gentlemen."

Mr. Merritt of the Committee asked (p. 1950): "Is it your view that the act, as it now reads could be construed so as to make you a railroad instead of an interurban?"

Mr. Cornell replied, "Well, undoubtedly, if there is such a thing as an electric railroad, we are one. If not, what are we?"

Mr. Sims of Tennessee, and Mr. Sanders of Indiana, members of the Committee, then had this colloquy with Mr. Cornell, and it is to be noted that Mr. Sanders represented the territory where electric railroads have had a peculiar growth:

> "Mr. Sims. You think the service you perform should be the criterion for your classification?
>
> "Mr. Cornell. Yes, sir. We can bill a shipment from Lawrence (Kan.) to New York or to San Francisco or to any other part of the country.
>
> "Mr. Sims. You are doing as much interstate business as a steam railroad or any other kind of a railroad.
>
> "Mr. Sanders of Indiana. Can you couple on to any kind of a car?
>
> "Mr. Cornell. Yes; we interchange about 600 cars a month.
>
> "Mr. Sanders of Indiana. The ordinary interurban railroad can not do that.
>
> "Mr. Cornell. No.
>
> "Mr. Sanders of Indiana. *What we have always understood by interurban railroad is these long street railroads. We have never understood that a railroad became an interurban just because it used electric power.*

"Mr. Sims. It could not possibly be against the public interest for you to do the service you seek to do and receive the same treatment as though your road were run by steam instead of by electric power?" (Italics added)

The foregoing very clearly shows that the Committee had in mind no classification based merely on motive power and that it drew a complete distinction between an independently operated electric railroad like the Piedmont & Northern and the lines represented by Mr. Cornell, engaged in the same essential interchange freight business as the steam roads, and what was referred to as an "interurban", an expanded street railway extending between cities.

Mr. Denison of Illinois, another state in which electrical railroad development had been extensive, then of his own motion brought up the distinction between charter powers of a regular railroad and the limited powers of the limited railroads to which street, suburban or interurban railways were deemed to belong (pp. 1951-1952) and the following colloquy occurred:

"Mr. Denison. We have a street railroad law and a regular railroad law in our state, and you can incorporate under the street railroad law or the regular railroad law. If you incorporate under the street railroad law you can not condemn private property unless it is shown that it is impossible from an engineering standpoint to run on the streets; and if so, if you can show that, you can take private property; but if it is possible to run on the streets, they can not take private property for their right of way. If they want to run over a private right of way they have the right to incorporate under the railroad act, and then they can condemn what private property they need.

"Mr. Cornell. I believe under the act under which we are incorporated we are a railroad; that is, we are incorporated under the railroad law; and that we have condemned property. * * *

> "Mr. Denison. *There is no question, then, that you are classed as a railroad. A street railroad company has no right to condemn except under the circumstances stated.*" (Italics added.)

On several occasions, Commissioner Clark, representing the Interstate Commerce Commission, appeared before the committees, made statements as to the purposes of the legislation, and as to the Commission's views as to what should be excluded from regulation. He said to the House Committee (Report of House Committee Hearing on H. R. 4378, Volume 1, page 123):

> "Oh, yes. I think it is simply rounding out the enforcement of the principle underlying this that a railroad having entered a given field shall be protected against unreasonable competition by the construction of another line that is not needed. The public would be protected against the obligation to maintain two lines where one was sufficient, and would be further protected in that the carrier having entered the field would be required to occupy it further, in so far as the public interest required."

Commissioner Clark further stated that the capital for railroad construction could be more readily obtained if there were prohibition against unnecessary competition, or the assurance that if a railroad is built it will be "*protected against* what I might term '*piratical building*' by a competitor of a road that is not needed." (Ibid. Volume 1, page 98)

Speaking of the provisions of the Act which are now paragraphs (18) to (22), the Chairman of the House Committee, in presenting the committee report before the house committee of the whole, said:

> "We can get better service by strengthening the existing lines than by creating a rival or parallel line which would diminish the ability of the first line to make further improvements and betterments." (Congressional Record, Vol 58, page 8813)

Senator Cummins, Chairman of the Senate Committee on Interstate and Foreign Commerce, referring to the same provisions of the Act, said on the floor of the Senate:

> "The purpose of this provision of the bill is to recognize as the controlling consideration the right and interest of the public to have reasonable and adequate transportation facilities and to escape payment for transportation facilities that are not needed and are mere duplication of existing facilties." (Congressional Record, Vol. 59, p. 863.)

Explaining the purposes of the regulatory provisions of the bill to the Senate Committee, Commissioner Clark said:

> "In our last annual report we said, with regard to the future of railroads, that whatever line of policy is determined upon, the fundamental aim or purpose should be to secure transportation systems that would be adequate for the Nation's need even in time of stress or peril and that will furnish to the public safe, adequate and efficient transportation at the lowest cost consistent with that service, and to that end there should be the provision for the following:
>
> 1. .....
> 2. .....
> 3. Limitation of railway construction to the necessities and convenience of the Government and of the public and assuring construction to the point of these limitations. The thought underlying the first part of this suggestion is that in some instances, for speculative or competitive reasons, railroads have been built in excess of the reasonable demand and in excess of the necessities of the territory built into, as well as of its reasonably prospective traffic. A railroad once built ordinarily must be operated and permitted to earn a living. The public should not be burdened with the maintenance of two or more railroads when one would substantially answer every legitimate purpose. In this connection it would be desirable that in the exercise of its powers The Congress should say that

no railroad shall be constructed or extended that is to engage or is engaged in interstate commerce unless, in addition to required authority from the state, a certificate of public convenience and necessity, is secured from Federal authority." (Hearing before the Senate Committee on Interstate Commerce, 65th Congress, Third Session, Volume 1, pages 232-3.)

Mr. Charles E. Elmquist, representing the National Association of Railway and Utility Commissioners (the state regulatory bodies) said in the same hearing before the Senate Committee (Ibid. Vol. 1, page 754):

"We favor the limitation of railroad construction to the necessities and convenience of the public and believe that no new construction should be permitted in the absence of a certificate of public convenience and necessity from the proper local authorities. If the construction is to be made by an interstate line, *or will substantially affect interstate commerce,* there can be no objection to having the federal authorities approve the same, but its action should be in addition to, and not exclusive of, the action of local authorities. The location of spur and industrial tracks should be exclusively under the control of local authorities." (Italics added.)

Senator Cummins said on the floor of the Senate: (Congressional Record, Volume 59, part 1, page 138):

"I may remark, however, that it is in this section we have attempted to give the Government the right to prevent the construction of new lines. The very difficulties we have heard urged here so often have arisen at times because railroads have been constructed where and when they ought not to have been constructed. So we have given to the Interstate Commerce Commission, in connection with the board, the jurisdiction to prevent the construction of new lines where obviously the construction of new lines would simply impose another burden upon the public without adding anything to the public welfare."

Thereupon the following colloquy occurred between Senator Cummins and Senator Overman of North Carolina, who had in mind that State's own desire to build an intrastate railroad to its "lost provinces."

> Mr. Overman: "Suppose the State of North Carolina desired to construct a railroad with its convict system up through the mountains of North Carolina to reach a part of the state in which there are no railroad facilties. I understand that this board would have the right to prevent such a railroad from being built?"
>
> Senator Cummins: "No, not at all, if the railroad did not want to do any interstate business."
>
> Mr. Overman: "Suppose they wanted to connect with a line in another state?"
>
> Senator Cummins: "Then it would have to get the consent of the Government."
>
> Mr. Overman: "The State would have to get the consent of the Government?"
>
> Mr. Cummins: "Yes." * * *
>
> Mr. Cummins: "I know, Mr. President, that it shocks one when we think of the full power of regulating commerce, but I really do not know of any way to divide it. We have tried hard and labored earnestly to preserve to the states all the authority that can possibly be preserved. But when the Federal Government undertakes to regulate commerce among the states it cannot divide that authority with the states.
>
> "If the Federal Government believes a road should not be constructed because that road would cast upon the public an unnecessary burden, the responsibility for that decision cannot be shared by the State and Federal Tribunals, and we have thought that justice to the whole country would be more likely to be secured through the jurisdiction of a Federal Tribunal than through the State Tribunal."

These expressions as to the purposes of the legislation are exactly in accord with the purposes declared by this Court in the cases we have cited.

It is perfectly clear in the first place from a reading of the hearings before the Committees that there was no possible agreement as to just what the term "interurban" meant, no accepted or particular classification of railroads being recognized as coming within that term. Representatives of various electrically operated railroads appeared before the committees and none of them could agree on a definition of an "interurban electric railway." Some of them sought to have the legislation exclude their roads, on the ground that they were roads of local importance. Some sought to have the legislation include and regulate their roads, the same as steam roads, because in fact their roads were not of merely local importance, but extensively engaged in the interchange of freight of national importance with steam roads, and hence were roads of national importance.

In discussing the question of electric railroads, (Report of House Committee Hearings on H. R. 4378, Volume 3, page 2940) Commissioner Clark, representing the Interstate Commerce Commission's views, said:

> "It seems to me that any legislation affecting them at all might with propriety contain a definition of what an interurban road is because those who speak for them disagree as to this. The present law prohibits the Commission from establishing a through route as between a steam railroad and an electric passenger railway that does not engage in freight business in addition to its passenger business. I do not think it practicable to draw a line of jurisdiction dependent upon the power used, because electricity is used to an important extent on some of the larger steam railroads. In a good many places they use steam and electricity on the same track. It is reasonable, I think, to assume that electricity will in the course of a few years be used in lieu of steam to an enlarged and enlarging extent, so I think that the only basis on which to prescribe the jurisdiction is the nature of the business done by the carrier irrespective of power employed in moving traffic."

The Chairman: "Logically, interurban would include any railroad running between two cities."

Mr. Clark: "And carried to its logical conclusion, that would include them all, because that is what they all do, run between towns."

Mr. Sims: "Mr. Chairman, you will remember there was a gentleman from Michigan here who made considerable complaint about conditions on his road which was an electric road about the other roads refusing divisions * * *"

Mr. Clark: "Well, that is one of the examples you run across in all matters of this kind. You find one so-called interurban electric road that finds it to its interest to keep outside of the provisions of this act and then you turn to some other section of the country, perhaps another railroad, in physical considerations substantially the same, and you find it invoking the provisions of the act to regulate commerce and the activities of the Commission to require the steam roads to join it in through routes and joint rates * * *"

But Congress did not accept the suggestion and define "what an interurban is." It used the ambiguous and non-definitive word, although there was clear disagreement as to its meaning.

Mr. Elmquist, representing the National Association of Railroad and Public Utilities Commissioners, in urging the adoption of the provision contained in paragraph (22) said to the house committee: (Hearings on H. R. 4378, 1611-1613)

"It is the judgment of the Commissioners that the Interstate Commerce Commission should not be given the power to control the building of *spur and industry tracks or things of that kind.* In most of the states the law expressly gives to the State Commission the power to order any spurs, side or industry tracks when the public convenience and necessity require it. When these tracks are built, the Commission usually fixes the terms upon which they shall be constructed, and they become a part of the system

of the line of railroad. *It is purely a local question.* * * * It would not do, in our judgment, to give to the Interstate Commerce Commission the power to pass upon *these purely local matters* and to deprive the people of the state of any service which they get from their local tribunal. * * *

"The same amendment refers to electric interurban lines. There are a great many electric interurban lines, the average length of which in this country is about 48 miles. Generally speaking, *they perform a local service under the laws of the State*, they are subject to the regulatory powers of the local commissions. We can see no good reason for transferring to the Interstate Commerce Commission the power to determine the extension or the abandonment of *those lines which are specially designed to take care of local service.* You are trying to take care of evils or injuries and it strikes us that you are imposing a greater hardship upon the public, and, perhaps, upon the industry itself, in asking the interested bodies to come here to Washington to have those matters disposed of." (Italics added.)

Mr. Byrd M. Robinson, President American Short Line Association, said (Ibid. page 1974), in arguing that the tap lines and industrial lines should receive the same treatment in connection with their relations to the trunk lines, regardless of stock ownership:

"In view of the facts, we ask that in the act that you prepare the standard fixed for determining the status of all railroads shall be that of service and not of stock ownership."

With regard to electric railroads, he then said:

"That same proposition also applies to the question of motive power; we have introduced three witnesses here for the purpose of showing you that commercial electric railways, the most modern railways that we have in this country, are now being discriminated against and are being very seriously retarded in their growth, for the sole and only reason that they use

electric power. We do not think that fact ought to enter into their status at all. The only question is that of service. * * *"

The American Electric Railway Association, Committee on National Relations, addressed to the committee a letter (Ibid, page 3418) referring to Senate Bill 2906, in which it was said:

"The distinction between steam and electric interurban roads is well known and is constantly recognized by the courts, Congress, and the several state legislatures in dealing with the transportation question. Upward of 60 per cent of all electric railway mileage in the country is strictly city mileage, and not to exceed 5 per cent of the gross earnings of all electric railway, city, surburban and interurban, is derived from interstate traffic.

"No one will contend that city electric railways are to be classed, for purposes of operation, with steam railroads. The interurban electric railways are, to a large extent, affected by their local surroundings; they must depend largely upon revenue earned from local communities served, and they are affected to a greater extent by the competition of motor vehicles, they must be considered by themselves."

We do not undertake to review in detail the various proposed forms and amendments to the forms of the various exclusion provisions. They are quite fully reviewed in the "note" to the opinion of the court below. (R. 458-486.) After a consideration of all of these changes it is quite evident that the difficulty which the committees had was as to the proper form of verbiage in which to express the idea which the committees had in mind and uniformly agreed upon. The only conclusion to be drawn from reading all of the proceedings is that the committees were undertaking to exclude from federal regulation, not only as to extensions of lines, but also as to consolidations, issuance of securities, etc., only those electric railways which were of distinctly local and non-national importance, and that to

achieve this end, the final amendments took the form of using one expression to define that class, to wit, street, suburban and (or) interurban electric railways.

None of the amendments proposed to exclude "electric railways" without the qualifying word, "interurban", and hence none of the forms of amendments undertook to exclude all independently operated electric railroads. Certainly the use of the qualifying word "interurban", especially in immediate conection with "street" and "suburban" ahead of the words "electric railways" was intended to and did define a class different from the class which would have been defined had the act excluded in general terms "electric railways". It will be observed that throughout the changes the committees were not only seeking to define and exclude a certain limited class of electric railways, that is, street, suburban and interurban electric railways, but that in immediate connection with that exclusion they were seeking to define and exclude certain purely local tracks of even steam railroads, not of sufficient importance to conflict with the purposes of the act, to wit, spur, industrial, team, switching and side tracks, wholly within one State.

The form of the language itself, the limitation of the excluded electric railways to the limited class of "street, suburban and interurban electric railways" had already in itself defined a class of railroads of peculiarly local importance, not affecting national transportation sufficiently to come in conflict with the purposes of the act, and thereupon by moving forward ahead of this expression the qualifying clause "located wholly within one state", the committees more clearly limited the exclusion of spur, industrial team, switching or side tracks, even of steam roads, to those of purely local significance.

Finally, it appears that after some differences as to the form of language, but none as to the idea sought to be expressed, it was agreed, first in connection with the consolidation provisions, to doubly assure the limitation of

"street, suburban and interurban electric railways" to such railways as were of peculiarly local importance, by adding the expression "which are not operated as a part or parts of a general steam railroad system of transportation."

This is shown by Congressional Record, Volume 59, part 1, page 587 *et seq.* In connection with the consolidation provision in Senate Bill 3288, Senator Watson offered the amendment before the committee of the whole, substituting the language "street, suburban and interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation."

In explanation of this amendment, Senator Cummins said to the Committee of the Whole:

> "Mr. President, I desire to say that there has been a good deal of controversy *with regard to the proper way to express the idea the committee had,* and so far as I am concerned, I am quite as well satisfied with the form used in the amendment as with the form used in the bill itself. I have no objection to the amendment." (Italics added.)

That amendment was adopted without any further discussion or debate, and then Senator Watson offered two other amendments "to make the other sections of the bill conform to the section which was just amended". The first of these two amendments wrote the same words into the exception provision as to extensions, now paragraph (22). As to that, Senator Cummins merely said, "The same observation applies to that amendment, it makes the bill uniform in that respect." And that amendment was adopted without debate to make the language uniform with that of the consolidation provision amendment.

The second of these two amendments, applying, among other things, to security issues, labor disputes, etc., was similarly adopted without debate, writing the same language into this provision, and Senator Cummins merely

said, "The two former amendments having been adopted, this one ought to be, in order to keep the bill in harmony."

After the adoption of these amendments, Senator Smith of South Carolina offered an amendment to strike out all of section 34, dealing with extensions and abandonments, on the ground that it would stop railroad construction entirely, and encroach upon the sovereignty of the state. (Congressional Record, Vol. 59, part 1, page 746.)

On page 749, Senator Cummins, in charge of the bill on the floor, said:

> "I do not believe, therefore, in the theory of the Senator from South Carolina, that if the people of his state desire to build a railroad and should come to Washington and lay the venture before the Interstate Commerce Commission, the Interstate Commerce Commission would deny the authority because the interest of some existing railroad might be served by refusing the authority; I cannot conceive of such a thing. * * *
>
> "We propose here to grant to a governmental body the right to survey the situation, and then say, as to a railroad which is to be a common carrier and to be engaged in interstate commerce, whether under the circumstances, looking at the future of the community and the opportunity for traffic and everything of that sort, it is a fair and reasonable venture upon which the people of the country will be called upon eventually to pay a return. * * *
>
> "Mr. President, I do not think it is quite fair to test the merit of the propositions contained in this bill, by reference to some of the imperfections of government. This is a plain, easily understood proposition as to whether the construction of railroads which will carry interstate commerce for the future, and which must be supported by the imposition of rates which will return a fair interest upon the investment or value of the property shall be placed under public control. That is the plain, easily understood proposition, I think every Senator has thought sufficiently about the matter and is sufficiently acquainted not only with the legislation of his own state, but

with the policy of the country generally to record an intelligent judgment upon the proposal; I am quite willing to take a vote upon it."

Senator Jones of Washington then asked Senator Cummins again if the bill in its final form would prevent the Northern Pacific from building a road between two points wholly within the State of Washington, but not connected with its main line, without securing a certificate.

Senator Cummins replied: "That depends entirely on whether or not it desires to do an interstate business. This does not relate at all to a railroad that is willing to content itself with purely intrastate traffic; but if the road carried commerce between the states, then I think it would be compelled to apply to the Commission under this section." (Ibid, page 750.)

Thereupon the amendment of Senator Smith of South Carolina was rejected. (Ibid, page 866.)

The following conclusions are to be drawn from a careful study of all the voluminous proceedings before the committees and of the debates and proceedings on the floors of Congress:

There was never any intention to make motive power a basis of classification for exclusion; there was never any intention to exclude all electric railroads; the *rationale* for exclusion of all constructions referred to in the final form of paragraph (22) was to exclude those constructions which would be of purely local importance and which would not have sufficient effect upon transportation of national importance to come into conflict with the purposes of the legislation; that in pursuance of that *rationale* only such railroads were excluded as come within the very limited class "street, suburban and interurban electric railways" in the first place; and that finally to make assurance doubly sure that no construction of national importance should be excluded from the regulation, the additional qualifying words "which are not operated as a part or parts

of a general steam railroad system of transportation" were added as an additional limitation to the exclusion.

Finally, it is clear that by the very use of the word "interurban" ahead of the words "electric railways" and in immediate connection with the words "street" and "suburban", the intention was to confine the exclusion to those long extended street railways, engaged essentially in an interurban extension of street railway business, railroads having the limited powers of street railway corporations, and engaged in the essential local business of street railway corporations, even if such essential local business should include general transportation of local freight, the conclusion being quite clear that there was no intention to exclude any construction which would have a substantial effect upon national commerce, or upon the national system of transportation.

We think it is quite clear from the legislative history that there was never an intention to exclude such a railroad as the Piedmont & Northern, almost all of whose business is interstate, interchange business of distinctly national importance, strongly competing with the trunk line steam railroads of the territory for national traffic.

6. General usage of the term "interurban electric railways" at and prior to the passage of the Transportation Act did not include or contemplate such a railroad as petitioner; and if it had it would not control the meaning of the statutory language.

The foregoing review of the legislative proceedings is eloquent that general usage at the time did not contemplate such a railroad as petitioner, engaged in business of the character done by it, as an "interurban electric railway." If there had been any such general usage or meaning of the term, it would have been brought to the attention of Congress during the exhaustive investigation it conducted.

Footnote 4 to the Court's opinion in *United States v. Village of Hubbard*, 266 U. S. 474, 478, is eloquent to the same effect, as we have already pointed out.

Petitioner below offered as an expert witness Professor Richey, Professor of Electric Railroad Engineering at Worcester Polytechnic Institute, who had had a long experience with electric roads in the middle west. (R. 299.) He traced the history of the progressive development from electric urban lines, to suburban lines, and then to interurban lines. (R. 300-305.) He described particularly certain lines in the middle west with which he was familiar, testified to inroads on their passenger traffic by automobile beginning in 1913 to 1917 and that this resulted into their going into some freight business (R. 305-306); that a good many of those lines interchanged freight cars with connecting steam railroads; that those electric roads competed with steam roads for passenger and freight traffic (R. 307); that they physically connected with steam roads and handled interstate freight (R. 307). He described some such roads of considerable trackage. (R. 309) Throughout all his discussion and description of those electric lines in the middle west, he referred to them as "interurbans" and as commonly known by that term. (R. 300-309.) He then gave a detailed description of the petitioner's line based upon inspection. (R. 310-324.) He compared the construction and equipment of petitioner as being similar to the middle western lines referred to and different from electrified portions of steam railroads.

He ended his direct examination with the assertion of the opinion that there were "three or probably four general classes of electric railways in the United States prior to 1920": 1. Urban railways (street railways and rapid transit lines); 2. Suburban railways, operating in cities and to adjacent suburbs; 3. Interurban railways, "which operated between cities and towns, with no built up settlement between them, that is, between separate cities and

towns;" and 4. Electrified sections of main line steam railroads. In line with his testimony, he asserted that "interurban electric railway" had acquired a technical and generally accepted meaning in the electric railway industry in the United States prior to 1920. (R. 324.)

He was not asked by petitioner's counsel, and did not testify, what that meaning was. The only possible inference from his testimony is that, if there was such a technical and generally accepted meaning of the term, it referred to electric railways of the character of those in the middle west to which most of his testimony was devoted and which he characterized as "interurbans."

On cross-examination he admitted that none of those roads had any such interchange freight business as the Piedmont & Northern has (R. 326); that Union Traction Company of Indiana, one of the principal of those lines, had only about 17 per cent of its revenues from freight; that Detroit United Railway had only about 9 per cent of its revenues from freight, doing a passenger business of over four million dollars a year (R. 328); and that Terre Haute, Indianapolis & Eastern and the Indianapolis & Cincinnati had freight and passenger revenues in about the same ratio (R. 329); that in 1917 the reports for all those railroads showed about 10.3 per cent freight revenues to total revenues and in 1920 about 12.1 (R. 329).

Assuming, as his evidence would show, that "interurban electric railways" had a technical and generally accepted meaning as comprising that class of railways about which he testified, at the time of the enactment of the Transportation Act, then clearly no such railroad as the Piedmont & Northern, no railroad doing such a business as it does, was known within that term. The electric railways of the general class referred to by him as interurbans were predominantly and distinctly passenger carriers, their essential service being interurban passenger service, a mere extension of suburban service. To only a minor and rela-

tively unimportant extent had any of them gone into freight business. Where any large part of the total passenger and freight traffic was technically interstate it was due to the fact that the line ran between cities across a state line. (R. 326.)

Even the Piedmont & Northern was, until 1920, almost as heavily engaged in interurban passenger traffic as in freight traffic. But beginning with that year its freight traffic became increasingly predominant and important. In 1927, when it applied to the Commission for certificate for these extensions, its freight revenues were $2,340,809.58 and its passenger revenues only $124,154.28. (R. 353.) And the purpose of the extension was to divert from other interstate carriers and gain for itself $3,597,384.00 of carload freight revenues, from national traffic, the first year, and amounts in succeeding years increasing annually at the rate of 8.4 per cent. (R. 134-137.)

The question before the Commission in the proceeding there was the status of the Piedmont & Northern at the time of the application, 1927. Nothing of its character was known as an "interurban electric railway" when the Transportation Act was passed. Congress could not have contemplated a road of its character when it used the term.

The question in this suit is the status of petitioner when it began to build extensions without certificate in 1930. Then its freight revenues were 94.5 per cent of total revenues (R. 417) and 95.7 per cent of those freight revenues were from interline interchange freight moving all over the country (R. 418).

Certainly no such railroad was known as an interurban in and prior to 1920.

In plain, ordinary acceptation and meaning of the word it is not an interurban. Its business is not a "between city" business. It is a between state, trans-state, and national business. Every steam railroad in the United States is an interurban in the same sense in which peti-

tioner can claim to be. Unless something different from that literal sense was meant by the term as used in paragraph (22), Congress would not have used it, would have simply excluded "electric railways" etc., without the modifying word "interurban."

Not as controlling the construction of the act of Congress in any way, but as bearing on the question of what character of railroad was generally and customarily known and described as an interurban electric railway in 1920 and prior thereto, it is significant that petitioner was not and is not classed as an interurban by the law of South Carolina, its parent state, or by the law of North Carolina, the other state in which it operates. The statutory definition of interurban electric railways excludes it from that class in South Carolina, and it has been classified in the same category as freight carrying steam railroads by the Supreme Court of North Carolina.

The South Carolina Code contained in 1920 and still contains a rather complete regulatory chapter covering "Interurban and Street Railways," (Chapter 161, Code of Laws of South Carolina, 1932, sections 8479-8506; Code of 1922, sections 5038-5064). It includes employer's liability provisions, regulations as to fenders and vestibules on street railways and vestibules on interurban railways, heating of cars, provisions for arbitration of labor disputes, separate accommodations for the races, for permitting standing in aisles, police powers of conductors and employees, safety appliance and equipment provisions, etc. And section 8432 (section 5041, Code 1922) defines "street railways" and interurban railways" as follows:

> " 'Street Railway' shall be construed to include all railroads and railways operated by electricity, whose main business consists in the transportation of passengers between different points within the limits of a municipality; and *the phrases 'Interurban Railroad' or 'Interurban Railway' shall be construed to include all railroads and railways operated by electricity whose*

main business consists in the transportation of passengers from one municipality to another." (Italics ours.)

Section 8488 (section 5047, Code 1922) makes that definition of interurban railroads and railways apply to the whole chapter.

The Piedmont & Northern was not, therefore, in 1920 and is not now an interurban electric railway within the statutory definition of the law of its parent state. It was not and is not subject to that state's code regulating interurbans. Certainly there was no customary, common, or accepted understanding in South Carolina that the petitioner, or any electric railroad engaged in the "main business" in which petitioner is engaged, was an "interurban electric railway." The law of that state declares it is not an interurban.

We submit that the South Carolina statutory definition is helpful, persuasive, and an expression of common understanding of the term. It is entirely logical, in making classification depend upon the "main business" done by a carrier. Classification in South Carolina does not depend upon the mere incident of motive power. A railroad in that state is not an "interurban electric railway" simply because it is motivated by electricity and operates between cities on its line.

Similarly the law of North Carolina, the other state in which petitioner operates and seeks to extend, recognizes no classification based on the mere incident of motive power. And the Supreme Court of North Carolina has classed the petitioner's North Carolina line, upon the basis of the character of business done, in the same category as steam railroads, rather than in that of street, suburban, or interurban electric railways. *Kirkpatrick v. Piedmont Traction Company,* 170 N. C. 477.

The organizers, builders and operators of petitioner's present lines, built and first operated them through prede-

cessor corporations, the South Carolina line through Greenville, Spartanburg and Anderson Railway Co., a South Carolina corporation, and the North Carolina line through Piedmont Traction Company, a North Carolina corporation. (R. 408.) After the two lines were in operation, the owners incorporated petitioner, Piedmont & Northern Railway Company, a South Carolina corporation, and it took title to the properties and succeeded to the rights of the two predecessors in 1914. (R. 408-409.)

The case of *Kirkpatrick v. Piedmont Traction Co., supra,* arose just before the corporate change, and involved the status and classification, under the law of North Carolina, of petitioner's North Carolina line. Although the Piedmont Traction Company was chartered as a street railway company with the limited powers of such railway (R. 405, finding 5), whereas the Piedmont & Northern was chartered as a regular railroad, with full power of eminent domain and all powers of a railroad (R. 403, finding 1), the North Carolina court in that case held that the former's business had stepped out of the generally understood class of street railway business and into the class of *interchange freight business done by steam railroads,* and classified it in the same category with steam railroads.

The question at issue was whether the Piedmont Traction Company's line along Franklin Avenue in Gastonia constituted an additional burden on the property of Kirkpatrick, an abutting land owner, for which he could recover damages. It had already been held in North Carolina that a street railway does not constitute an additional servitude for which an abutting land owner is entitled to compensation but that a steam railroad does. The Traction Company contended that it was a street railway and that hence its line in Franklin Street was not an additional servitude. The court said:

> "This action is brought to recover of the defendant damages for operating a commercial railroad, con-

sisting of freight traffic as well as passenger traffic, along Franklin Avenue in the town of Gastonia, upon which the plaintiff lives in a house owned by him on a lot abutting the said avenue. The defendant operates a street car line of the city of Gastonia. The defendant also operates freight trains and interurban passenger trains over this avenue in front of plaintiff's house. The defendant's line of railroad runs from Gastonia to Charlotte, N. C. Its interurban passengers cars and trains carry passengers between these two points and intermediate points. Its freight trains likewise handle freight between these two points and intermediate points, and, in addition, it transfers its freight cars to the Seaboard Air Line Railway, the Southern Railway and the Carolina and Northwestern, and these roads in turn transfer cars from their lines, loaded with freight, to the defendant's lines. It is a regular standard gauge railway, using electricity as a motive power instead of steam. * * *

"We are of opinion that, from the nature and description of the defendant's business, as given in the record, and the manner in which it operates its freight trains and interurban passenger trains, it should be classed as a 'steam railway' and cannot be regarded as the ordinary street railway. The matter is not to be determined by the character of the motive power, but rather by the character of the business done, as well as the injury inflicted by it.

"The testimony in this case tends to prove that the passenger cars used by the defendant in its interurban service are about the same size as those used on the great railroads of the country. These interurban passenger trains carry baggage, mail and other things that are carried by other passenger railways. The freight cars used by the defendant are similar to cars used on the ordinary railroads of the country and of the same standard gauge. These freight cars are transferred to other lines and the freight cars of other lines are transferred to this defendant's line in all respect as is the custom between the railroads of the country. The freight cars are the usual standard cars—about sixty feet long."

That decision was rendered December 15, 1915, over four years before the enactment of the Transportation Act. At that time the law of North Carolina understood petitioner's line, in view of the main business done, to be in the category of steam railroads.

From all the foregoing it results, we submit, that there is no fact basis in the record for the contention that the common understanding and generally accepted meaning of the term "interurban electric railway," in and prior to 1920, comprised, included, or contemplated such a railroad, doing such a business, as petitioner's, either in South Carolina, North Carolina, or the United States. On the other hand, it is clear that petitioner does not come within the general acceptation of the meaning of that term.

But, in any event, the holding in the *Texas & Pacific Case* would reject such considerations as not controlling, even if the fact existed, and would require construction of the term in paragraph (22) in the light of, and in furtherance of, the remedial purposes of the legislation, not in the light of loose and general usage of the term in other connections.

It seems plain that the status of petitioner, for purpose of classification as falling within paragraphs (18) to (21) or within the proviso of paragraph (22), is to be determined upon a consideration of its predominant and essential business as a carrier, its "main business." The fact that a trivial and inconsequential 3 or 4 per cent of its whole business may have the peculiar nature and characteristics of "interurban" business cannot control its classification. (See Finding V. 5, R. 423-424.)

7. The decision below is in accord with the later and more authoritative decisions of the Commission and with the holdings of the lower federal courts.

Some of the earlier Commission opinions used the word "interurban" loosely and in other connections in a way

which may be said to be in conflict with its later decisions in the *Piedmont & Northern Case*, 138 I. C. C. 363.

Rather than review those decisions ourselves, it seems sufficient to quote from the opinion of the court of three judges in the former suit, 30 F. (2d) 421, 434, 436. It was there said, with foot-notes as quoted:

> "The petitioner cites opinions of the Interstate Commerce Commission and the United States Railroad Labor Board in which electric roads, some of them having a much greater mileage than the Piedmont & Northern, have been described as interurban.[5] Most of these cases involved applications for through routes and joint rates with steam roads. The extent to which the electric carrier was engaged in the general transportation of freight was discussed, since electric street railways, not so engaged, are outside

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[5] Chicago & Milwaukee Elec. R. Co. v. Illinois Cent. R. Co., 13 I. C. C. 20; Cedar Rapids & Iowa C. R. & Light Co. v. Chicago & N. W. R. Co., 13 I. C. C. 250; Cincinnati & Columbus Traction Co. v. B. & O. Southwestern R. R. Co., 20 I. C. C. 486; St. Louis, Springfield & Peoria R. R. v. P. & U. Ry. Co., 26 I. C. C. 226; Louisville Board of Trade v. Indianapolis, Columbus & Southern Traction Co., 27 I. C. C. 499; Jurisdiction over Urban Electric Lines, 33 I. C. C. 536; Chicago, Ottawa & Peoria Ry. Co. v. Chicago & Northwestern Ry. Co., 33 I. C. C. 573; St. Louis, Mo.-Illinois Passenger Fares, 41 I. C. C. 584; Lourie Mfg. Co. v. Cincinnati Northern R. R. Co., 42 I. C. C. 448; U. S. R. R. Labor Board, Dec. No. 33, Dec. 11, 1920.

The Illinois Traction System is described (St. Louis, S. & P. R. Co. v. P. & P. U. Ry. Co., 26 I. C. C. 226; St. Louis, Mo.-Illinois Passenger Fares, 41 I. C. C. 584; Lourie Mfg. Co. v. Cincinnati Northern R. Co., 42 I. C. C. 448), as an aggregation of railroads which operates about 425 miles of standard-gauge electric lines in Illinois and owns some 900 cars, of which 775 are freight cars. The system has through routes and joint rates with steam roads to the west, northwest, and southwest; in 1915 its gross freight revenue was about $400,000. The decision of the Labor Board refers to "Pacific Electric Railway Company, operating upward of 600 miles of road; the Fort Dodge, Des Moines and Southern R. R., owning 2400 box and coal cars, and the Spokane & Inland Empire R. R., crossing State lines and operating passenger and freight trains."

The Memorandum concerning Electric Railway Companies Reporting to the Interstate Commerce Commission for the Year 1917, issued by the Bureau of Statistics of the Commission May 12, 1919, referred to in United States v. Village of Hubbard, 266 U. S. 474, 478, note 4 (45 S. Ct. 160, 69 L. Ed. 389), and discussed in the petitioner's brief, gives the mileage operated and the distribution of operating revenues for 267 roads. With the exception of certain railroads devoted to special service, such as terminal and belt line railroads, there were few of any importance in 1917 whose freight revenues formed so large a part of the whole as did those of the Piedmont & Northern. The reports do not show how much of the revenues were derived from interstate or interchange business.

the purview of the act. But the Commission was not called upon to draw the line between an interurban and a steam railroad. * * *

"The construction placed by the Interstate Commerce Commission upon the language contained in the exception in paragraph 22 of section 1, and in section 20a of the act, has not been uniform. On October 12, 1920, the Commission ruled that it did not have jurisdiction over the Piedmont & Northern in regard to the issuance of securities because the road was covered by the exception in section 20a. This ruling, however, was ex parte, and no opinion seems to have been filed. The Application of Michigan United Railways Co., 67 I. C. C. 452, for a certificate of public convenience and necessity, was considered on April 21, 1921. The railroad serves cities in Michigan and adjacent territory and has a physical connection for interchange of business with the Pere Marquette Railway. The Commission's memorandum of 1917 shows that it is 404.16 miles in length, and that its passenger revenues were $3,402,002.27, and freight revenues, $392,633.58, in that year. It was decided that the railroad was covered by the exception in paragraph 22 of section 1 of the act.

"On the other hand, the Commission decided in 1922 that it had jurisdiction under section 20a over the Sacramento Northern Ry. Co., 71 I. C. C. 653, and Id., 79 I. C. C. 782. This company owned and operated an electric railway extending 165 miles northerly from Sacramento, which was equipped with locomotives capable of hauling from 40 to 50 loaded freight cars. The most important part of its business was through passenger and freight traffic, originating on its lines and delivered to steam trunk lines for interstate transportation. The Commission, answering the contention that the road was excluded from its authority as an interurban railroad, said: 'We are by no means convinced, however, that the Northern is an interurban electric railway as that term is used in the statute. Much of the transportation service rendered by it, no doubt, is similar to that rendered by electric interurban railways. The service

of such railways, however, is distinguished by its local and limited character and by the fact that the bulk of their revenues are derived from the transportation of passengers.[6] Their facilities for handling freight are usually inadequate or lacking so as to disable them from engaging in its general transportation. The amount of business interchanged by them with connecting carriers is ordinarily very small. Congress obviously did not intend to exclude all electric railways from the operation of Section 20a. If the Western Pacific were to completely electrify its system it would not thereby become a "street, suburban, or interurban electric railway." Some of its operations might partake of the nature of street, suburban, or interurban railway service, but its business as a whole would be of a far broader character. Similarly it appears from the facts of record that the Sacramento Northern is more than an interurban carrier as that term is generally understood.' See, also, Ex parte No. 38, 122 I. C. C. 414.

"It is our conclusion that the more recent rulings of the Commission conform to the purpose of the statute and point the way to the correct classification of the Piedmont & Northern."

We submit that the later decisions of the Commission, including the decision in the *Sacramento Northern Case*, 71 I. C. C. 653, 79 I. C. C. 782, and in the *Piedmont & Northern Case*, 138 I. C. C. 363, do, as declared by Judge Soper, "conform to the purpose of the statute and point the way to the correct classification of the petitioner." They are persuasive in support of the decision below. The Commission, "a tribunal appointed by law and informed

[6] The statement that the service of an interurban railroad is distinguished by its local and limited character is not disputed. It is borne out by the opinions of the Commission, of the Labor Board, and by statements and testimony offered to the Congressional Committee when the Transportation Act of 1920 was under consideration. See the statement of the American Electric Railway Association, and of the National Association of Railroad and Utilities Commissioners, in Hearings before House Committee on Interstate and Foreign Commerce, H. R. 4378, volume 3, p. 2418; volume 2, pp. 1611, 1613, 1629.

by experience,"* ought to have a very good judgment and knowledge as to what is an "interurban electric railway."

The decision below is in entire accord with other analogous decisions by the lower federal courts.

Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co., 286 Fed. 540, was one of the earliest cases in which a federal court construed paragraph (22). The defendant was undertaking to build certain trackage without first having procured certificate under paragraph (18). The plaintiff sued for injunction. The case was on all fours with the *Texas & Pacific Case*, the contention of defendant being that the proposed trackage would be a "spur" or "industrial" track located wholly within one state, within the meaning of paragraph (22). The court heard testimony covering all the details as to the character and business of the defendant, its competition with other lines, and the territory sought to be invaded and served by the projected trackage.

That court wrote a well reasoned opinion. It construed the statute in the light of the legislative purpose, particularly stressing Commissioner Clark's statements to the Committees which we have above quoted, and outlined the particular purposes of paragraph (22) substantially as this Court did in the *Texas & Pacific Case*. It rejected, as not controlling, various definitions of "spur" and "industrial" tracks, and held that the trackage in question was within paragraph (18) and not exempt under paragraph (22), saying:

> "Considering all of the facts and circumstances of the present case, including the proposed operation of entire trains over the proposed track and the main line of defendant in continuous transportation and without switching movements or charges; considering the sidings and public loading stations to be constructed and used in connection with said track;

*Illinois Central R. Co. v. I. C. C., 206 U. S. 441, 454.

considering the expense of the proposed undertaking; considering the competitive character and results of the contemplated use and operation of said track and trains; considering the fact that the proposed track and train service will be between points where the competing railroad now maintains stations and between which the competing railroad now operates a regular train service; and in view of the entire record,—I reach the conclusion that such proposed track has the characteristics of, and constitutes, not a 'spur track', but a new 'line' more specifically, an extension or a branch line."

In the recent case of *Pennsylvania R. Co. v. United States*, 40 F. (2d) 921, a court of three judges, in a suit brought to set aside an order of the Commission granting a certificate for an extension, followed the *Texas & Pacific Case* and the *Boyne City R. Co. Case, supra,* in its declaration of the purposes of the provisions of the Act.

The decision in *Piedmont & Northern Ry. Co. v. United States,* 30 F. (2d) 421, and the decision of the District Court below in this case are in entire harmony with all these decisions and with the later and more authoritative decisions by the Commission.

This Court is not bound by administrative interpretation even where it has been uniform. And where it has not been uniform it is entitled to less weight. *United States v. Missouri P. R. Co.*, 278 U. S. 269, 280.

Certainly the later and better reasoned interpretation by the administrative body is entitled to more weight than the earlier, conflicting and less carefully considered interpretation.

8. Informal treatment of petitioner, in other connections, as an interurban electric railway, by the Commission prior to its formal decision in 138 I. C. C. 363, the ruling of the old Railway Labor Board, holding that petitioner was excluded from its jurisdiction under section 300 of the Transportation Act, and the fact that the Census Bureau and the Post Office Department have classed petitioner as "interurban," are without present significance.

Petitioner relies on certain routine and informal action of the Commission, prior to its formal decision in 138 I. C. C. 363, as indicating that the Commission treated it in certain respects as an interurban electric railway. (R. 173, 362-365, 450-451.)

It particularly relies upon the informal ruling, in correspondence with the auditor of the petitioner, made by Secretary G. B. McGinty, of the Commission, that, while Section 15a applied to it, Section 20a did not. (R. 362-365.)

This informal treatment can have no present significance in view of the holding by the full Commission in 138 I. C. C. 363, upon full development of the facts and after full hearings and arguments, that petitioner is subject to paragraph (18) and is not excepted by paragraph (22). The report and order of the Commission are set out in full in the record. (R. 8-58.)

As this Court said in the former Piedmont & Northern appeal, 280 U. S. 469, 476, not even formal action by the Commission can operate as *res judicata* of the question. Certainly informal, *ex parte* action is without significance.

The petitioner places some reliance upon the decision of the former Labor Board in *Brotherhood of Locomotive Engineers, et al. v. Spokane & Eastern Railway, et al.*, decision No. 33 (docket 26-a, December 11, 1920) wherein that Board held that the Piedmont & Northern and certain other electric carriers were excluded from the Board's jurisdiction as being "street, interurban and

suburban electric railway(s) not operated as a part of a general railroad system of transportation," within the meaning of section 300 of the Transportation Act, since repealed by section 14 of the Railway Labor Act of 1926 (44 Stat. L. 577, 45 U. S. C. 163).

Petitioner, we suppose, does not rely on this decision as authority, but only treats it as having some persuasive effect. The Labor Board was passing upon another statute, dictated by other considerations. Its decision does not compare, for persuasive force, with the decision of the Interstate Commerce Commission that the Piedmont & Northern is not an "interurban electric railway" within the meaning of paragraph (22).

The Labor Board's decision is very far from having the persuasive force of the decision of the three judges, two circuit judges and one district judge sitting, in 30 F. (2d) 421. That district judge is now circuit judge and that special court was practically the Fourth Circuit Court of Appeals.

The Labor Board's decision is far from having the persuasive force of the Commission's decision in *Proposed Control of Sacramento Northern Railway by W. P. R. Co.*, 71 I. C. C. 653, to which we have previously referred.

The fact that the Post Office Department has compensated the petitioner for mail service as an interurban electric railway at rates fixed by the Commission in the *Electric Railway Mail Case* is certainly without significance here. There is nothing to indicate that the question of its status, whether it is an interurban electric within the meaning of the Act providing for railway mail pay service on urban and interurban electric railways, 39 U. S. C. 569-570, was ever raised or argued with the Post Office Department. Such question has not been litigated. Such treatment by the Department, with apparent full acquiescence of petitioner, can have no significance. Otherwise, by acquiescing in such treatment by the Post-

master General, petitioner could lift itself by its own boot straps into freedom to extend without certificate.

It needs nothing more than statement of the contention to show that the fact that the Census Bureau has classified and enumerated petitioner or other roads somewhat similar to it as interurban can have no significance as to the question here raised.

II.

Petitioner is "Operated as a Part or Parts of a General Steam Railroad System of Transportation" Within the Meaning of the Limitation Upon the Exclusion in Paragraph (22), and Hence is Within Paragraph (18). Thus in Any Event the Extensions Were Properly Enjoined.

Throughout the argument under Point I it has been necessary to suggest the argument under this point, since the latter has a material bearing on the former.

Paragraph (22) does not merely exclude "interurban electric railways." The qualification keeps out of the exclusion provision, and keeps within the regulatory provisions of paragraphs (18) to (21), any electric railroad, even an interurban electric railway, if it is "operated as a part or parts of a general steam railroad system of transportation."

What is a *general* steam railroad system of transportation? What does it mean to be "operated as a part or parts" of such a general system? What was the purpose of Congress in restricting the exclusion proviso regarding "interurban electric railways," in section 1, paragraph (22), and in sections 15a and 20a, uniformly, by adding this restricting clause? These are questions just as important to this case as the question as to what Congress meant or understood by "interurban electric railways."

Petitioner, as we have already pointed out, cannot pre-

vail on this appeal unless it establishes: not only (1) that it is an "interurban electric railway" within the meaning of those words as used; but also (2) that it is "not operated as a part or parts of a general steam railroad system of transportation."

The review of the legislative history we have made above, and that contained in the "note" to the lower court's opinion, a brief furnished by petitioner (R. 458-486), show, we think conclusively, that Congress recognized that there was ambiguity in the words "interurban electric railway" and added the additional restrictive words, *ex abundanta cautela,* to make it perfectly clear that it was not intended by either exclusion provision to except from regulation any interstate electric carrier, whether within or without the ambiguous term "interurban," if it was really operated as a part of that which the whole regulatory purpose was to protect and preserve, to-wit: the general steam railroad system of transportation.

The only possible answer to this thought is that when Congress said "a general steam railroad system of transportation" it meant a particular steam railroad system. The English language has just one word apt to express clearly that a particular steam railroad system was not meant. That is the word "general." And Congress used that word.

The Commission in 138 I. C. C. 363 (R. 13-17) did not consider this question at all. It merely held that petitioner was not an "interurban electric railway" and hence that the application was within its jurisdiction.

The three judge court, in 30 F. (2d) 421, and the court below (R. 448) did consider this question, upon these respondents' contentions presented in pleadings and arguments in both cases. But we submit that neither court gave the question sufficiently careful attention, because both were deciding that the Piedmont & Northern was not an "interurban electric railway," in the light of

which decision the second question became academic. However, it is interesting to analyze just what was said. The court below was very brief. It said (R. 448):

> "We finally conclude that while it is closely tied up by existing traffic agreements, some of them highly preferential, yet its independence of control and operation is such as to keep us from saying that it is operated as a part of any general steam railroad system of transportation."

That throws no light on the reasoning upon which that conclusion was reached. It merely evidences that the court concluded that "a general steam railroad system of transportation" meant a particular steam railroad. Petitioner admittedly is not operated or owned by any steam railroad, although its operating officers themselves operate an interstate steam railroad, the Durham & Southern, owned by closely affiliated interest, and having a similar preferential contract with the Seaboard. (R. 265-266, 339-340, 422-423.) The two railroads have joint offices (R. 281), as well as the same principal operating officers.

The District Court pointedly commented on this intimate relation with the Durham & Southern as indicating the importance of the Piedmont & Northern in through freight transportation. (R. 456.)

The three judge court, however, did show its reasoning in concluding that the Piedmont & Northern was not "operated as a part or parts of a general steam railroad system of transportation."

It said, 30 F. (2d) 425-426:

> "The operation of the road, it is admitted, is entirely in the hands of the Piedmont & Northern Railway Company, independent of any other railroad corporation; and it is not a part of any other system of transportation, unless that phrase is taken in a broad sense to mean the whole aggregation or network of railways in the United States which are

physically connected for the interchange of business. In this sense the petitioner is a part of a railroad system, since, as will presently appear, it has physical connections and through traffic arrangements with steam roads which give it access to all parts of the country. In this sense the term "railway system" has been used in a number of cases by the Supreme Court, as for instance in Texas & Pac. Ry. v. Gulf, etc., Ry. Co., 270 U. S. 266, page 277, 46 S. Ct. 263, 266 (70 L. Ed. 578), where Mr. Justice Brandeis said: "By that measure (Transportation Act, 1920), Congress undertook to develop and maintain, for the people of the United States, an adequate railway system." See, also, Railroad Commission of Wisconsin v. C., B. & Q. R. Co., 257 U. S. 563, 589, 42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086; Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S. 456, 478, 44 S. Ct. 169, 68 L. Ed. 388, 33 A. L. R. 472.

"But, on the other hand, the term has also been used in a more restricted sense both by Congress and by the federal courts, and in this sense, something more than physical connections and through traffic arrangements must exist between railroads to constitute them parts of the same railway system. There must be also unity of ownership or unity of management and control."

Supporting the narrower view of the meaning "system" as a particular railroad system, under common control, common management, and common operation, it cited various statutory uses of "system" in that sense and various decisions of the Commission construing the word in the narrower sense, 30 F. (2d) 426-427.

Manifestly there are the two senses of the word "system," a broader meaning, and the narrow meaning of a particular railroad system. If Congress had used the expression, "not operated as a part or parts of a steam railroad system," it might well have been argued that it meant a particular system. But it negatived the narrower meaning by using the word "general."

Faced with that argument, the opinion of the three

judge court, 30 F. (2d) 427, entirely changed the grammatical structure of the clause to answer the argument. It said:

> "It is contended that the presence of the word 'general' in the phrase 'general steam (railroad) system of transportation,' requires that the broader of the two meanings we have discussed should be applied. But the word 'general' may be given proper weight if it is referred to the kind of transportation, excluding railroads engaged in a special or local service, and indicating those engaged in general transportation."

In other words, that court, to reach the conclusion it reached, totally changed the grammatical sense of the clause and treated it as if it had been written "not operated as a part or parts of a steam railroad system of general transportation."

Nothing can be clearer than that, in the clause as written, "not operated as a part or parts of a general steam railroad system of transportation," the word "general" modifies the word "system," not the word "transportation." The clause must be entirely re-written and the grammatical meaning wholly changed, to make "general" modify "transportation."

Such disregard of the grammatical meaning as written, such torturing of the context and grammar to arrive at a different meaning from that shown by the language used, violates, we submit, the rule of construction of *Spokane and Inland R. R. Co. v. U. S.*, 241 U. S. 344, 350, to which the court gave effect in construing the word "interurban". If the remedial language of a remedial act must be given a liberal or broad interpretation in order to effectuate the remedial purposes, and if for the same reason an exception to the remedial provision must be given a narrow or strict construction, it equally follows for the same reason that an exception to

the exception, a limitation upon the exception, must be given a broad and liberal construction. A narrow or strict construction of the exception to the exception would have the same effect as giving a broad construction to the main exception, or a narrow construction to the remedial provisions. A construction which narrows the remedial provisions conflicts with the legislative purposes and is forbidden. A construction which broadens the exception to the remedial provisions is forbidden because that produces the same result as narrowing the remedial provisions. The exception to the remedial provisions may be broadened in violation of this rule equally either by a direct broad construction of the exception itself or by a narrow construction of an exception to or limitation upon the main exception. Both have the same effect as a narrow or strict construction of the remedial provisions.

The clause "not operated as a part or parts of a general steam railroad system of transportation" is an exception to or a limitation upon the main exception which excludes "street, suburban and interurban electric railways" from the remedial provisions of the act. Restricting the meaning of "general steam railroad system of transportation" has exactly the same effect to enlarge the class of the main exception of "street, suburban and interurban electric railways," as would a broad construction of the language excepting that class. And both would equally narrow and restrict the class to be included within the remedial provisions of paragraphs (18) to (20).

We submit that the broader of the two constructions must be given to "general steam railroad system of transportation" under the very same rule which calls for a strict construction to be put upon the excluded class of "street, suburban and interurban electric railways." The fundamental and controlling rule throughout is to give such construction to all provisions, the

remedial provisions, the main exception therefrom, and the exception to or limitation upon the exception, as will liberally effectuate the remedial purposes.

Under this principle it is quite inadmissible to change the grammatical sense of "general steam railroad system of transportation" so as to make "general" modify "transportation" and to destroy its plain meaning as modifying "system," and thereby to make "system" mean a particular steam railroad system, rather than a general one. Congress expressly and plainly wrote the words so as to show conclusively that it meant a "general steam railroad system" rather than a particular one.

Although Judge Soper's opinion did not so state, it is evident that the three judge court gave more significance to the use of the indefinite article before the word "general" than it did to the word "general" modifying "system." The thought was that the use of the indefinite article would indicate the narrow meaning of a particular railroad system, whereas the use of the word "general" categorically indicates a broader meaning, something more "general" than a particular railroad system. Too much significance is given to the use of the indefinite article if it is made to destroy the meaning and effect of "general".

If Congress had written the clause, "which is not operated as a part or parts of *the* general steam railroad system of transportation," it would have been clear beyond dispute that the meaning was the national transportation system, in which sense this Court used the word "system" in *Railroad Commission of Wisconsin v. Chi., B. & Q. R. Co.*, 257 U. S. 563, 585; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek Case*, 263 U. S. 456, and the *Texas & Pacific Case*, 270 U. S. 266. And it would have been clear beyond dispute that petitioner would be within the clause. Petitioner's railroad is certainly operated as a part or parts of the

national steam railroad system of transportation, which the Act sought to preserve, just as much as the Durham and Southern or any other interstate steam railroad. It is an integral and important part of the national system.

But the use of the indefinite article does not necessarily lead to the alternative that a particular steam railroad system was meant, a particular corporate ownership, control or operation. The national steam railroad system of transportation, that "backbone" of the nation's transportation facilties so often referred to, and which was the main subject to which the whole Transportation Act was addressed, is not only "the general steam railroad system of transportation" but is by the same token "*a* general steam railroad system of transportation."

To give to the indefinite article the controlling force of demanding construction of the limiting clause of the proviso as meaning *a particular steam railroad system*, is to take away from it its essential quality of indefiniteness and give it the quality of definiteness and particularity which is the essence of the definite article. "A" generalizes; "the" particularizes. Certainly "a general" generalizes and does not particularize.

Courts have habitually construed the indefinite article as connoting generality rather than particularity.

In *Thompson v. Stewart,* 60 Iowa 225, 14 N. W. 247, it was held that where a person contracted to lease for a certain purpose "a room that is improved and suitable," he does not bind himself to furnish a particular room or one room, but fulfills his contract if he provides additional room, improved and suitable.

In *Commonwealth v. Wetzel,* 84 Ky. 537, 2 S. W. 123, it was held that the term "a judge" in a statute providing that "a judge" may cause any house to be searched for gaming tables, comprehends a general or entire class, and cannot, without distorting its meaning, be

restricted to judges of county, city, and police courts; and therefore that the judge of the Louisville law and equity court has authority to issue such a search warrant.

In *City of St. Louis v. Handlan,* 242 Mo. 88, 145 S. W. 421, it was held that the St. Louis charter authorizing the assembly to establish "a building line" along boulevards, did not prevent establishing different building lines along the same boulevard.

In *United States v. Perry,* 133 Fed. 841, it was held that a provision in a tariff act referring to statuary produced from "a solid block or mass of marble," was not limited to statuary made from a single block, but included statues each carved from three solid blocks of marble.

In *Bourland v. First Nat. Bank Bldg. Co.,* 152 Ark 139, 237 S. W. 681, it was held that a statute providing for the designation of a depository for city funds and requiring all funds to be deposited therein when "a" city depository is selected, did not limit the city to a single bank as depository, the article "a" being a word of vague meaning and too indefinite to limit to a particular depository.

Again, the expression "which is not operated as a part or parts of a general steam railroad system" does not impose as the sole alternative meanings either a particular steam railroad system or the entire national system. There is a more general meaning of "system" than that of a particular system with unity of corporate control, and which yet is less general than that of the entire steam railroad system of the nation.

Section 15a, in providing for treatment by rate groups, recognized that the entire system of transportation of the nation was made up of regional or rate-group systems, and provided for uniform treatment within each regional system. In *New England Divisions Case,* 261 U. S. 184, the New England carriers had received group

treatment on divisions. They appeared together in the case as a regional system of transportation. Relief given by the Commission to the carriers as a regional system was sustained.

Manifestly there the New England carriers constituted "a general steam railroad system," and yet less general than the whole steam railroad system of transportation of the country.

So the steam railroad system of the Southeast is a "general steam railroad system of transportation," made up of particular systems under particular control. The facts show that the petitioner is an integral and important part of such general system, is operated as a part thereof. It is, accordingly, not within the exclusion of paragraph (22), even if "a general steam railroad system of transportation" be construed to have a narrower meaning than the entire general system of the United States.

Certainly the expression, "a general steam railroad system of transportation," in a limitation upon an exception to a remedial statute written in for the very purpose of more sharply narrowing the exception and taking less cases out of the remedial provisions, cannot fairly be construed as meaning a particular steam railroad system, without entirely deleting the word "general."

The legislative history, the manner in which it was throughout universally agreed that the purpose of paragraph (22) was to take out of the regulation of paragraph (18) only constructions and abandonment of a purely local character and importance, not calculated to conflict with the remedial purposes of the Act, and within the regulatory competency of local authorities, and finally the writing in of the express limitation "which is not operated as a part (or parts) of a general steam railroad system of transportation" to restrict the exceptions, in section 20a, in 15a and in section 1, paragraph (22), shows that Congress was

excluding only "parochial matters," not having a general bearing on the general transportation system. The *rationale* of the exclusion is the same as that suggested by this Court in *Lehigh Valley R. Co. v. Board of Public Utility Comrs.*, 278 U. S. 24, as the dividing line between federal authority under the Transportation Act and authority left in the States.

The spirit, purpose and policy of the Transportation Act throughout was to bring under federal regulation and under the administrative authority of the federal Commission those matters having a general importance and bearing on the general transportation system, and to leave the "parochial" matters to local authorities because not calculated to conflict with the purposes of the Act.

Just as "spur, industrial, team, switching and side tracks, located or to be located wholly within one state," when those words are properly construed in the light of the context and of the legislative purposes, refer to "parochial" matters, so "street, suburban, or interurban electric railways," when those words are properly construed in the light of the same principles, also refer to matters of only parochial and local importance.

But as to the latter Congress made the assurance doubly sure that nothing but parochial matters should be excluded from regulation by adding the express limitation "which are not operated as a part or parts of a general steam railroad system of transportation."

There is nothing "parochial" about the extensions enjoined in this case. They have a vastly greater general bearing on national transportation than had the proposed trackage of the Santa Fe which this Court held was properly enjoined. And unless the court below be affirmed, the result is that the mere incident of electric motive power confers complete freedom on an interstate carrier of national importance to accomplish all of the injuries and evils of unrestricted expansion sought to be remedied by paragraph (18).

In last analysis, Congress, when it wrote the somewhat involved, the ambiguous, the inartificial, language of paragraph (22), was not engaging in an exercise in grammar or etymology. It was dealing with a very practical problem of remedial legislation and division of powers. It was seeking to express an intention. What that intention was can only be arrived at by the application of the doctrine of the *Texas & Pacific Case,* which is entirely controlling here. Congress plainly did not intend to confer immunity on all electric railroads other than electrified portions of steam railroads. It plainly did not intend to confer immunity on a railroad such as petitioner to make unauthorized extensions of the character here involved.

In *The Lion* (1869), L. R. 2 P. C. 525, at p. 530, 38 L. R. Ad. 51, at p. 54, Lord Romilly, M. R., delivering the judgment of the Judicial Committee, said:

> "The meaning of particular words in an Act of Parliament, to use the words of Abbott, C. J., in *Rex v. Hall,* 'is to be found not so much in a strict etymological propriety of language, nor even in a popular sense, as in the subject or occasion on which they are used.'"

That statement is an epitome of this Court's holding in the *Texas & Pacific Case* and of the holding of the District Court below in the present case.

CONCLUSION.

It is respectfully submitted that the decree below was right and should be affirmed.

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